SUPREME COURT OF THE UNITED STATES.

No. 314.

FOLEY, AVERY & CO., THIRD OPPONENTS, PLAINTIFFS IN ERROR,

VS.

MRS. WIDOW IRENE SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 United States circuit court, sixth judicial circuit eastern district of Louisiana.

Petition praying for writ of seizure and sale.—Filed February 28, 1865.

Mrs. WIDOW IRENE SMITH
vs.
CHS. G. MCHATTON. } No. 3,526.

To the honorable the circuit court of the United States, sixth judicial circuit and eastern district of Louisiana:

The petition of Mrs. Irene Smith, widow, residing in Louisville, and citizen of the State of Kentucky, respectfully represents:

That she is the holder and owner of three certain promissory notes secured by mortgage with vendor's privilege, dated New Orleans, March 30, 1857, drawn by Chs. G. McHatton to his
2 own order, and by him indorsed in blank, one for fifteen thousand dollars, payable on the 1st day of May, 1860; one for fifteen thousand dollars, payable on the 1st of May, 1861; and the other for ten thousand dollars, payable on the 1st of May, 1862, each bearing eight per cent. interest per annum from date until paid; that none of said notes are paid, and the two first described were duly protested for non-payment, as will more fully appear by said notes and copies of protest hereto annexed and made part of this petition. That in order to secure the punctual payment of said notes and all eventual interest and costs, by act before Theo. O. Stark, then a notary, said McHatton did mortgage and hypothecate and acknowledge the vendor's privilege upon a certain plantation or tract of land situated in the parish of East Baton Rouge, in this State, and about two miles below the town of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to Geo. O. Hall, below by the plantation now or lately belonging to F. D. Conrad, and in the rear by lands hereinafter described; said plantation having a front on
3 the Mississippi river of twenty-two and a half arpents, more or less, by the depth thereunto belonging, according to the titles which are deposited in the office of the Consolidated Association of the Planters of Louisiana in this city: Also a certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the east by lands of Denis Daigre; on the north by lands of J. & H. Perkins; on the south by lands of Daigre and Conrad; and on the west by the plantation or lands firstly described, together with the improvements, and 80 shares of the stock of the Consolidated Association of Planters of La., &c., &c., &c., as more fully described in the act aforesaid, a copy of which is hereto annexed and made part of this petition.

Wherefore, the premises considered, petitioner prays for an order of seizure and sale, and that the marshal of this court be directed to

seize, and after due proceedings, to advertise and sell the aforesaid described property to satisfy the claim herein, and for costs
4 and all general relief.
(Signed), FELLOWS & MILLS, *Att'ys.*

50 ct. int. rev. stp. affixed and cancelled.

Order.

Let executory process issue herein as prayed for, and according to law.
New Orleans, February 28th, 1865.

E. H. DURELL, *Judge.*

Promissory note.—Filed with petition, Feb'y 28th, 1865.

$15,000,00. NEW ORLEANS, *March 30th*, 1857.
On the first day of May, 1860, after date, I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand dollars and —— cents, for value received, with interest at the rate of eight per cent. per annum from date until final payment.
(Signed), C. G. McHATTON.

Indorsed: Pay Irene Smith or order.

C. G. McHATTON.

Pay E. Rousseau, cas., or order.

IRENE SMITH.

Ne varietur: New Orleans, March 30th, 1857.
THEODORE O. STARK, *Not. Pub.*

5 Slip annexed to foregoing note:

This note 15,000 belongs to Mrs. Irene Smith; please pass same to her credit.
(Signed) S. H. BULLEN, *Cas.*

Protest.—Filed with petition Feb'y 28th, 1865.

UNITED STATES OF AMERICA, *State of Louisiana:*

By this public instrument of protest, be it known, that on this fourth day of May, in the year one thousand eight hundred and sixty, at the request of the cashier of and holder for the Citizens Bank of Louisiana, of the original note, whereof a true copy is on the reverse hereof written, I, Adolph Boudousquie, notary public, in and for the city and parish of New Orleans, State of Louisiana, duly commissioned and sworn, presented said note to the proper officer at the Louisiana State Bank, where the same is made payable, and
6 demanded payment thereof, and was answered that no funds had been deposited there to pay said note.

Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents, do publicly and solemnly protest, as well as against the drawer or maker of the said note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered for want of payment of the said note.

Thus done and protested in the presence of Louis Dutour and Charles F. Barry, both of this city, witnesses.

In testimony whereof, I grant these presents under my signature, and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) [SEAL.] A'D BOUDOUSQUIE, *N. P.*

$15,000. NEW ORLEANS, *March* 30, 1865.

On the first day of May, 1860, after date, I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand
7 dollars, for value received, with interest at the rate of eight per cent. per annum from date until final payment.

(Signed) C. G. McHATTON.

Indorsed: Pay Irene Smith or order.

C. G. McHATTON.

Pay E. Rousseau, cas., or order.

IRENE SMITH.

Ne varietur: New Orleans, March 30, 1857.

THEODORE O. STARK, *Not. Pub.*

Promissory note.—Filed with petition Feb'y 28th, 1865.

4,916 67.

$15,000. NEW ORLEANS, *March 30th*, 1857.

On the first day of May, 1861, after date, I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand dollars and —— cents, for value received, with interest at the rate of eight per cent. per annum from date until final payment.

(Signed) C. G. McHATTON.

Indorsed: C. G. McHATTON.
IRENE SMITH.

Pay E. Roussea, cas., or order.

CAS.

8 *Protest.—Filed with petition Feb'y 28th*, 1865.

STATE OF LOUISIANA:

By this public instrument of protest, be it known, that on this fourth day of May, in the year one thousand eight hundred and sixty-one, at the request of the cashier of and holder for the Citizens'

Bank of Louisiana of the original note, whereof a true copy is on the reverse hereof written, I, Adolph Boudousquie, a notary public, in and for the city and parish of New Orleans, State of Louisiana, duly commissioned and sworn, presented said note to the proper officer at the Louisiana State Bank, where the same is made payable, and demanded payment thereof, and was answered that no funds had been deposited there to pay said note.

Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said note, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests, suffered or to be suffered for want of payment of the said note.

9 Thus done and protested, in the presence of Ernest Petitpain and Paul Srima, both of this city, witnesses.

In testimony whereof, I grant these presents under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) [SEAL.] A'D BOUDOUSQUIE, *N. P.*

4,916.

$15,000. NEW ORLEANS, *March* 30, 1857.

On the first day of May, 1861, after date, I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand dollars and —— cents, for value received, with interest at the rate of eight per cent. per annum from date until final payment.

C. G. McHATTON.

Indorsed: C. G. McHATTON.
IRENE SMITH.

Pay E. Rousseau, cas., or order.

S. H. BULLEN, *Cas.*

I, the undersigned notary, do hereby certify that the parties to the original note, whereof a true copy is above written, have been duly notified of the protest thereof, by letters to them by me

10 written and addressed, dated on the day of the said protest, and served on them respectively, in the manner following, viz:

By directing that for C. G. McHatton, drawer, to him at Baton Rouge, La., and by enclosing the one for Irene Smith, indorser, in the one for S. H. Bullen, esq., cashier, directed to him at Louisiana, Ky.; which letters I deposited prepaid in the post office in this city on the same day of said protest.

In faith whereof, I have hereunto signed my name, together with Ernest Petitpain and Paul Srima, witnesses, at New Orleans, this fourth day of May, eighteen hundred and sixty-one.

(Signed) [SEAL.] A'D BOUDOUSQUIE.
(Signed) ERN'T PETITPAIN.
(Signed) PAUL GRIMA.

Promissory note.—Filed with petition Feb'y 28th, 1865.

$10,000. NEW ORLEANS, *March 30th*, 1857.

On the first day of May, 1862, after date, I promise to pay to the order of myself, at the Louisiana State Bank, ten thousand dol-
11 lars and —— cents, for value received, with interest at the rate of eight per cent. per annum until final payment.

(Signed) C. G. McHATTON.

Indorsed: (Signed) C. G. McHATTON.

Act of sale.

Filed with peittion February 28th, 1865, and also marked B, and offered in evidence Febr'y 7th, 1866.

5-ct. int. rev. stamp, cancelled.

STATE OF LOUISIANA,
City of New Orleans:

Be it known, that this day before me, Theodore O. Stark, a notary public, in and for the parish of Orleans, and State of Louisiana, aforesaid, duly commissioned and sworn, personally came and appeared Mistress Irene Williams, widow of the late Benjamin Smith, of Louisville, Kentucky, who declared that, for the consideration and on the terms and conditions hereinafter expressed, she does by these presents, grant, bargain, sell, convey, transfer, assign, and set over, with all legal warranties, and Charles Grandison Mc-
12 Hatton, esq., of the parish of East Baton Rouge, in this State, his heirs and assigns, and acknowledging due delivery and possession thereof, the undivided one-half of, all and singular, the following described lands, slaves, and stock, to wit: 1. A certain plantation or tract of land situated in the parish of East Baton Rouge, in this State, about two miles below the town of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to George O. Hall, below by the plantation now or lately belonging to F. D. Conrad, and in the rear by the lands hereinafter described, the said plantation having a front on the Mississippi river of twenty-two and a half arpents, more or less, by the depth thereunto belonging, according to the titles which are deposited in the office of the Consolidated Association of the Planters of Louisiana, in this city.

2. A certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the east by lands of Denis Daigre; on the north by the lands of J. and H. Perkins;
13 on the south by lands of Daigre and Conrad; and on west by the said firstly described lands, together with all the buildings and improvements on the said two tracts of land, rights, privileges, and appurtenances thereunto belonging or in anywise appertaining,

and all the horses, mules, cattle, ships, hogs, carts, wagons, and farming utensils now used upon the said land; also the following named and described slaves, now employed on said lands:

Name.	Age.
John Johnson	27
Sam Johnson	25
Fissex	30
Dick	35
William Henry	25
Charles Lombard	28
Alner	35
Nelson Haly	35
French Washington	22
Bob	23
Lin	16
Patrick	13
Warren	29
Winta	25
Gift	30
Martha	22
Manuel	24
Rosella	23
Kitty	30
Rachel Cooper	35
Ben Roberts	28
Simon	30
Isabel	30
Yellow Rachel	26

14 It being understood between the said parties that the said Mrs. Smith conveys only such interest as she may have in and to the above-named slaves, the same being subject to the will of the said Stephen Henderson, sr.

And the following named and described slaves for life, also, employed on the said lands, viz:

Name.	Age.
George Johnson	28
George Ross	38
Wilson	40
Honore	23
Hebert	35
Sam Lee	24
Charles	26
Tom Louis	22
Branzin	30
Bill Gad	28
Adam	25
Ben Sparrow	24
Fortune	35

Name.	Age.
Joe	24
Louis	48
Jesse	21
Cooper	25
Eliza	28
Mary Kentuck	25
Margaret Kenney	28
Martha	20
Dolly	25
Ann	29
Frances	28
Susan	20
Mary Georgetown	25
Mary Louise	30
Patsey	20
Charlotte	25
Biz Sarah	28
Adaline	24
Sally Henderson	23
Sally Davidson	23
Mary Jane	26
John Beasley	38
Jeff	24
15 Tom Sloan	24
Marcus	58
Nelson Evans	28
Lilslow	24
John Carter	..
Frank	17
Auguste	24
Stephen	34
Hypolite	..
Bill Lashley	28
June Bracy	26
David	50
Bohler	..
Sarah	40
Yellow Louise	24
Rachel Flaget	40
Rachel Louis	..
Henry	35
Cano	30
Margaret	14
Rachel	25
Francois	10
Bob	9
Ramee	7
Sophia	9
Tiny	3
Anthony	2

Name.	Age.
Sylvania	2
Buchanan	infant.
Alexander	1
Breckenridge	infant.
Ellen	2
Elizabeth	infant.
Zabelle	1
Randall	..
Zennie	..
George	8

Also the undivided one-half of eighty shares of the capital stock of the Consolidated Association of the Planters of Louisiana.

The tract of land firstly described, and the said eighty
16 shares of stock of the Consolidated Association, were purchased by said Mrs. Smith and said McHatton, in the proportion of one-half each, from Stephen Henderson, by act passed before Samuel Skolfield, recorder of the parish of East Baton Rouge, on the 13th day of March, 1849; and the tract of land secondly described was purchased by said Mrs. Smith and said McHatton from the succession of the late Robert Penny, by act passed before said Samuel Skolfield, recorder, on the 3d day of December, 1849. To have and to hold the said undivided one-half interest of said Mrs. Smith in and to the said lands, slaves, stock, &c., unto the said McHatton, purchaser, his heirs and assigns forever. And the said Mrs. Smith, vendor, does hereby moreover transfer unto the said purchaser all and singular the rights and actions of warranty to which she is or may be entitled, against any and all former owners of the lands, slaves, &c., herein described and conveyed, hereby subrogating the said purchaser in and to the said rights and actions, to be by him
enjoyed and exercised in the same manner as they might have
17 been by the said Mrs. Smith herself.

This sale is made and accepted for and in consideration of the price and sum of eighty thousand dollars in part payment, whereof the said purchaser has paid the sum of ten thousand dollars in ready current money, at the execution of these presents, and for the balance of said price has furnished his five certain promissory notes drawn to the order of, and indorsed by, himself, dated the 30th day of March, 1857, and made payable at the Louisiana State Bank in this city, as follows, viz: four for the sum of fifteen thousand dollars each, payable, respectively, on the first day of May, in the years 1858, 1859, 1860, and 1861, and one for the sum of ten thousand dollars payable on the first day of May, 1862. All of which said notes bear interest at the rate of eight per cent. per annum from date until final payment. And after having been duly paraphed by me, notary, in order to identify them with this act, were delivered to the said Mrs. Smith, who hereby acknowledges the receipt thereof, as well as of the said
ready money.

18 And in order to secure the full and punctual payment of said notes in principal and interest, the said purchaser hereby

specially mortgages and hypothecates the herein conveyed lands and slaves in favor of his said vendor, or of any future holder or holders of said notes, promising and binding himself not to alienate, deteriorate, or encumber the said lands and slaves to the prejudice of this mortgage.

And here the said purchaser declared that he dispensed with the production of a certificate from the recorder of mortgages for said parish of East Baton Rouge, to show the mortgages, if any, recorded against said lands and slaves, and to be annexed to this act as required by article 3,328 of the civil code of this State, hereby exonerating me, notary, from any responsibility in the premises.

It is moreover agreed between the said parties that the said McHatton is to pay all claims, liabilities, and debts which may exist against said plantation, slaves, &c., and he is likewise to receive
19 all assets and credits due it.

This done and passed in my office at the said city of New Orleans, in the presence of Edward Allen and James B. Williams, jr., competent witnesses, who sign these presents, with the said appearers and me, notary, on this thirtieth day of March, eighteen hundred and fifty-seven.

(Original signed) C. G. McHATTON.
(Original signed) IRENE SMITH.
(Original signed) E. ALLEN.
(Original signed) J. B. WILLIAMS, jr.
(Original signed) THEODORE O. STARK,
Not. Pub.

I, William Shannon, a notary public in and for the city of New Orleans, State of Louisiana, do hereby certify that the above and foregoing is a true and correct copy of the original act passed before Theodore O. Stark, which is now in my possession. In faith whereof I hereunto sign my name and affix an impress of my notarial seal at New Orleans, this fifteenth day of February, A. D. 1864.

(Signed) WILLIAM SHANNON, [SEAL.]
Not. Pub.

20 *Writ of seizure and sale.—Issued February 28th*, 1865.

The United States of America, circuit court of the United States, sixth judicial circuit and eastern district of Louisiana:

MRS. W'OW IRENE SMITH
vs.
CHS. G. McHATTON. } No. 3,526.

The President of the United States to the marshal of the eastern district of Louisiana, greeting:

You are hereby commanded to seize and sell, after legal demand, and according to law, the following described property, to wit:

A certain plantation or tract of land situated in the parish of East Baton Rouge, in this State and about two miles below the town of

Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to Geo. O. Hall, below by the plantation now or lately belonging to F. D. Conrad, and
21 in the rear by lands hereinafter described; said plantation having a front on the Mississippi river of twenty-two and a half arpents, more or less, by the depth thereunto belonging, according to the titles which are deposited at the office of the Consolidated Association of the Planters of Louisiana, in this city.

Also, a certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the east by lands of Denis Daigre; on the north by lands of J. & H. Perkins; on the south by lands of Daigre & Conrad; and on the west by plantation or lands firstly described, together with the improvements and eighty shares of the stock of the Consolidated Association of the Planters of Louisiana, &c., &c., as more fully described in the act aforesaid, a copy of which is annexed and made part of the plaintiff's petition.

To satisfy the plaintiff, Mrs. W'ow Irene Smith's claim, to wit, three certain promissory notes secured by mortgage with vendor's privilege, dated New Orleans, March 30th, 1857, drawn by Chas. G.
22 McHatton to his own order, and by him indorsed in blank, one for $15,000, payable on the 1st day of May, 1860; one for $15,000, payable on the 1st day of May, 1861; and the other for $10,000, payable on the 1st of May, 1862, each bearing eight per cent. interest per annum from date until paid and for costs. And what you do in the premises you make due return thereof, together with this writ, to our said court according to law.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 28th day of February, 1865.

(Signed) [SEAL.] F. B. VINOT, *Dy. Cl'k.*

Marshal's special return on foregoing writ.—Filed August 28th, 1866.

23 U. S. circuit court, eastern district of Louisiana.

MRS. W'OW IRENE SMITH
vs.
CHARLES G. McHATTON. } No. 3,526.

UNITED STATES MARSHAL'S OFFICE,
Eastern District Louisiana.

Be it remembered, that on the the 28th day of February, 1865, I, as marshal of the said court, did by virtue of a writ of seizure and sale, issued by the said court in the above-entitled suit, seize all and singular the property belonging to said deft. situated in the parish of East Baton Rouge, La., consisting:

1st. Of the undivided half of a certain plantation, together with all the improvements thereon.

2d. The undivided half of a certain tract of land situated in the

same parish, together with all the buildings and improvements thereon, stock, &c., the whole of which is fully detailed and described in the mortgage act on file and sued upon in the above suit.

When, after all the previous and legal requisites of the laws in such cases made and provided had been complied with, I offered
24 the aforesaid property at public auction at the court house door in the said parish of East Baton Rouge, La., on Saturday, the 29th day of April, 1865, at 12 o'clock m., when and where Mrs. Widow Irene Smith, the plaintiff in said suit, being the highest and last bidder, became the purchaser of said property for the sum of thirty-six thousand dollars cash, which amount of adjudication, after the payment of all costs and expenses accrued under said writ, the said pl'ff retained in her hands, in part payment of the amount claimed by her on said property; but by virtue of an order of the aforesaid court granted and directed to me, on the 26th of April, 1865, on the intervention of Bogart, Foley & Avery, I was enjoined and restrained from delivering to said pl'ff and purchaser any deed of sale of said property under said adjudication, unless the amount of said adjudication shall be paid to me in cash.

I now, therefore, make this my special return of the proceedings so far had under said writ.

New Orleans, 28th August, 1866.

(Signed) A. BOISBLANC,
D'y U. S. Marshal.

25 *Appraisement.—Filed with marshal's special return, August 28th, 1866.*

United States marshal's sale.

In the United States circuit court and eastern district of Louisiana.

MRS. WIDOW IRENE SMITH
vs.
C. G. MCHATTON. } No. 3,526.

We, Joseph Nepfler and Denis Daigre, do solemnly swear that we will faithfully discharge and perform all the duties incumbant upon us as appraisers of the property seized, and this day to be sold by the United States marshal for cash, in the above-entitled suit, No. 3,526.

We, the undersigned, having been appointed and qualified as appraisers to value and appraise the property seized, and to be sold this day for cash, by the United States marshal, in satisfaction of the above writ issued in the above-entitled suit, do value and appraise said property to be worth in cash fifty-four thousand dollars,
26 ($54,000.)

(Signed) JOS. NEPHLER.
(Signed) DENIS DAIGRE.

Sworn to and subscribed before me, this 26th April, A. D. 1865.

(Signed) WM. GRASS, *D'y. U. S. M.*

Certificate of mortgages.—Filed with marshal's special return, August 28th, 1866.

STATE OF LOUISIANA, *Parish of East Baton Rouge:*

RECORDER'S OFFICE.

I hereby certify that there is no mortgage of record in this office in the name of Charles G. McHatton against the following described property, to wit, the undivided one half of a certain tract of land or plantation situated in the parish of East Baton Rouge, at about two miles below the city of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to F. D. Conrad, and in the rear by lands hereinafter described,
27 said plaintiff having a front on the Mississippi river of twenty-two and a half arpents, more or less, by the depth therewith belonging, according to the titles which are deposited in the office of the Consolidated Association of the Planters of Louisiana in the city of New Orleans.

Also the undivided half of a certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the east by lands of Dennis Daigre; on the north by lands of J. and H. Perkins; on the south by lands of Daigre and Conrad; and on the west by plantation or lands first above described, together with all the buildings and improvements on the said two tracts of land, rights, privileges, and appurtenances thereunto belonging, or in anywise appertaining, also the undivided half of eighty shares of the stock of the Consolidated Association of the Planters of Louisiana, attached to the said property first described, except—

28 1. A conventional mortgage in favor of the Consolidated Association of the Planters of Louisiana, assumed by Charles G. McHatton and Mrs. Irene Smith, jointly, for one-half each in the purchase of the foregoing plantation from Stephen Henderson, and in the purchase of the aforesaid one-half interest from Mrs. I. Smith, her liabilities were therein assumed, of which the following balance appear unpaid, to wit:

One note due first March, 1859, for.....	$993 32
One note due first March, 1860, for.....	946 66
One note due first March, 1861, for.....	900 00
One note due first March, 1862, for.....	853 32
One note due first March, 1863, for.....	806 66
One note due first March, 1864, for.....	760 00
One note due first March, 1865, for.....	713 33
Making five thousand nine hundred and seventy-three $\frac{28}{100}$	5,973 28

The said notes being for principal and interest at the rate of seven per cent. annually, conformably to an act passed before Amedee Ducatel, a notary public of New Orleans, dated 19th November, 1847, and the said purchaser also assumed to pay annually on the first day

of June, of each year, without days of grace, to the said Con-
29 solidated Association, six dollars per share of bank stock in said institution, say four hundred and eighty dollars annually for sixteen years, commencing on the first of June, 1849.

Recorded 17th March, 1849.

2. A coventional mortgage in favor of Mrs. Irene Smith, vendor or any future holder or holders of the following described promissory notes, to wit:

Four notes for the sum of fifteen thousand dollars each, payable respectively on the first day of May, in the years 1858, 1859, 1860, and 1861, of date the 30th day of March, 1857, with 8 per cent. per annum interest from date until paid	$60,000 00
And one note for the sum of ten thousand dollars, payable on the first day of May, 1862, with 8 per cent. interest from date until paid	10,000 00
Making seventy thousand dollars	70,000 00

With eight per cent. per annum interest from date thereof.

Recorded 15th April, 1857.

3. Charles G. McHatton's bond as tutor to the minor, Merrit Williams, in the sum of seventeen thousand four hundred and fifty dollars	$17,450 00

Recorded 25th February, 1856.

30 4. A judicial mortgage as security on a twelve months' bond, in favor of John Bird, for the sum of fourteen thousand four hundred and thirty-one $\frac{67}{100}$ dollars $14,431 67

Bearing interest at the rate of ten per cent. per annum from date until paid.

Recorded 16th July, 1852, and recorded 14th February, 1859.

5. A judicial mortgage bearing on the property herein described, in which Charles G. McHatton, purchaser at sheriff sale, retains in his hands a balance of twenty-nine thousand five hundred and sixty-six $\frac{66}{100}$ dollars, ($29,566 66,) to pay and satify the mortgage thereon in favor of Mrs. Irene Smith, subject to any and all of the privilege mortgage if any there be against said property.

Recorded May 25th, 1860.

6. A privilege claim in favor of J. F. Gibbens for the sum of twelve hundred and thirty-five $\frac{50}{100}$ dollars, ($1,235 50,) due the first January,
1863, with eight per cent. interest after maturity, for services
31 as manager of Gaitness plantation, and signed McHatton and Williams.

Recorded March 25th, 1862.

Given under my hand and seal of office, at Baton Rouge, this 29th April, A. D. 1865.

(Signed) JOHN O. COMOS, [SEAL.]
Recorder.

5 cts. int. rev. stp. affixed and cancelled.

United States marshal's notice of sale, annexed to foregoing marshal's special return.

In the United States circuit court for the sixth circuit and eastern district of Louisiana.

MRS. WIDOW IRENE SMITH *vs.* C. G. MCHATTON. } No. 3,526.

By virtue of a writ of seizure and sale, issued and to me directed by the honorable the circuit court of the United States, for the sixth circuit and eastern district of Louisiana, I have seized and will expose at public sale at the court house door in the city of Baton
32 Rouge, on Saturday, the 29th day of April, 1865, at 12 o'clock m., the following described property, viz:

The undivided one-half of a certain tract of land or plantation situated in the parish of east Baton Rouge, at about two miles below the city of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to Geo. O. Hall, below by the plantation now or lately belonging to F. D. Conrad, and in the rear by lands hereinafter described, said plantation having a front on the Mississippi river of twenty-two and a half arpents, more or less, by the depth therewith belonging, according to the titles which are deposited in the office of the Consolidated Association of the Planters of Louisiana in the city of New Orleans.

Also the undivided half of a certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the
33 east by lands of Dennis Daigre; on the north by lands of J. and H. Perkins; on the south by lands of Daigre and Conrad; and on the west by plantation or land first above described, together with all the buildings and improvements on the said two tracts of land, rights, privileges, and appurtenances thereunto belonging or in anywise appertaining; also twenty-five ploughs and four cane carts; also the undivided half of eighty shares of the stock of the Consolidated Association of the Planters of Louisiana, attached to the said property first described.

The above property is sold subject to a lease in favor of Dr. J. M. Williams, for the year 1865.

Terms of sale: Cash in U. S. Treasury notes, with the benefit of the appraisement.

(Signed) CUTHBERT BULLITT,
Mar. 17. *U. S. Marshal Eastern Dist. of La.*

Third opposition of Bogart, Foley & Avery.—Filed April 26th, 1865.

34 U. S. circuit court, E. D. of Louisiana.

MRS. IRENE SMITH *vs.* CHARLES G. MCHATTON. }

On motion of Miles Taylor, counsel for Patrick H. Foley, William H. Avery, William B. Conger, residing in the city of New Orleans,

citizens of the State of Louisiana, and loyal citizens of the United States, composing the commercial partnership of Bogart, Foley & Avery, formerly established and doing business in the city of New Orleans, and now in liquidation, and intervening as third persons in opposition to the claim of Irene Smith, a citizen of the State of Kentucky, the plaintiff in the above-entitled case, and on suggesting to the court:

That they the said Bogart, Foley & Avery, in liquidation, are creditors of the said Charles G. McHatton, the defendant in the said suit, in the sum of fifteen thousand dollars, ($15,000 00,) with eight per cent. interest per annum from the 30th day of March, 1857,
35 and the further sum of five dollars cost of protest and costs of a certain suit, for which said sums of principal and interest, and costs of protest and of suit, they, the said Bogart, Foley & Avery, have a privilege on, and are entitled to be paid by preference out of, the proceeds of the sale of the property, seized and now advertised to be sold by Cuthbert Bullitt, United States marshal, under the authority of the court, in the above-entitled suit, for this, to wit:

That the said Charles G. McHatton, in part consideration of the price of the property seized and advertised for sale on the demand of the said Irene Smith, in the said suit as aforesaid, made his certain promissory note in writing at New Orleans, on the 30th of March, 1857, and thereby, then and there, promised to pay, on the first day of May, 1858, after date, to the order of himself, at the Louisiana State Bank, fifteen thousand dollars, for value received, with interest thereon at the rate of eight per cent. per annum from date until final payment, which said note was specially indorsed by the said Charles G. McHatton to the said Irene Smith, or order, and after being paraphed and marked "ne varietur," by Theodore O. Starke,
36 the notary public, before whom the public act of sale to the said Charles G. McHatton was now passed on the 30th of March, 1857, in order to identify it with the said public act of sale, was delivered to the said Irene Smith; that the said Irene Smith afterwards transferred the said note by her special indorsement to the Bank of Kentucky, through S. H. Bullen, its cashier; that at maturity the said note was duly presented for payment at the Louisiana State Bank, where it was made payable, and payment being refused, it was duly protested for non-payment, and the said Irene Smith and the other parties to the same were legally notified of the said protest; that on the 10th day of December, 1858, the said Bank of Kentucky, the holder of the said note, by public act, passed before Theodore Guyol, a notary public in New Orleans, transferred the said note and cost of protest to them, the said Bogard, Foley & Avery, for and in consideration of the sum of seventeen thousand and sixty-eight dollars and thirty-three cents, being the amount of capital and in-
37 terest due on the said note at that date and the cost of protest, and also subrogated them to all the rights, actions, privileges, remedies, &c., &c., given to the holder by said act of sale, to which the said Bank of Kentucky was or might be entitled in the premises, as will more fully appear by an authentic copy of the said act here-

United States marshal's notice of sale, annexed to foregoing marshal's special return.

In the United States circuit court for the sixth circuit and eastern district of Louisiana.

MRS. WIDOW IRENE SMITH *vs.* C. G. MCHATTON. } No. 3,526.

By virtue of a writ of seizure and sale, issued and to me directed by the honorable the circuit court of the United States, for the sixth circuit and eastern district of Louisiana, I have seized and will expose at public sale at the court house door in the city of Baton
32 Rouge, on Saturday, the 29th day of April, 1865, at 12 o'clock m., the following described property, viz:

The undivided one-half of a certain tract of land or plantation situated in the parish of east Baton Rouge, at about two miles below the city of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to Geo. O. Hall, below by the plantation now or lately belonging to F. D. Conrad, and in the rear by lands hereinafter described, said plantation having a front on the Mississippi river of twenty-two and a half arpents, more or less, by the depth therewith belonging, according to the titles which are deposited in the office of the Consolidated Association of the Planters of Louisiana in the city of New Orleans.

Also the undivided half of a certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the
33 east by lands of Dennis Daigre; on the north by lands of J. and H. Perkins; on the south by lands of Daigre and Conrad; and on the west by plantation or land first above described, together with all the buildings and improvements on the said two tracts of land, rights, privileges, and appurtenances thereunto belonging or in anywise appertaining; also twenty-five ploughs and four cane carts; also the undivided half of eighty shares of the stock of the Consolidated Association of the Planters of Louisiana, attached to the said property first described.

The above property is sold subject to a lease in favor of Dr. J. M. Williams, for the year 1865.

Terms of sale: Cash in U. S. Treasury notes, with the benefit of the appraisement.

(Signed) CUTHBERT BULLITT,
Mar. 17. *U. S. Marshal Eastern Dist. of La.*

Third opposition of Bogart, Foley & Avery.—Filed April 26th, 1865.

34 U. S. circuit court, E. D. of Louisiana.

MRS. IRENE SMITH *vs.* CHARLES G. MCHATTON. }

On motion of Miles Taylor, counsel for Patrick H. Foley, William H. Avery, William B. Conger, residing in the city of New Orleans,

citizens of the State of Louisiana, and loyal citizens of the United States, composing the commercial partnership of Bogart, Foley & Avery, formerly established and doing business in the city of New Orleans, and now in liquidation, and intervening as third persons in opposition to the claim of Irene Smith, a citizen of the State of Kentucky, the plaintiff in the above-entitled case, and on suggesting to the court:

That they the said Bogart, Foley & Avery, in liquidation, are creditors of the said Charles G. McHatton, the defendant in the said suit, in the sum of fifteen thousand dollars, ($15,000 00,) with eight per cent. interest per annum from the 30th day of March, 1857,
35 and the further sum of five dollars cost of protest and costs of a certain suit, for which said sums of principal and interest, and costs of protest and of suit, they, the said Bogart, Foley & Avery, have a privilege on, and are entitled to be paid by preference out of, the proceeds of the sale of the property, seized and now advertised to be sold by Cuthbert Bullitt, United States marshal, under the authority of the court, in the above-entitled suit, for this, to wit:

That the said Charles G. McHatton, in part consideration of the price of the property seized and advertised for sale on the demand of the said Irene Smith, in the said suit as aforesaid, made his certain promissory note in writing at New Orleans, on the 30th of March, 1857, and thereby, then and there, promised to pay, on the first day of May, 1858, after date, to the order of himself, at the Louisiana State Bank, fifteen thousand dollars, for value received, with interest thereon at the rate of eight per cent. per annum from date until final payment, which said note was specially indorsed by the said Charles G. McHatton to the said Irene Smith, or order, and after being paraphed and marked "ne varietur," by Theodore O. Starke,
36 the notary public, before whom the public act of sale to the said Charles G. McHatton was now passed on the 30th of March, 1857, in order to identify it with the said public act of sale, was delivered to the said Irene Smith; that the said Irene Smith afterwards transferred the said note by her special indorsement to the Bank of Kentucky, through S. H. Bullen, its cashier; that at maturity the said note was duly presented for payment at the Louisiana State Bank, where it was made payable, and payment being refused, it was duly protested for non-payment, and the said Irene Smith and the other parties to the same were legally notified of the said protest; that on the 10th day of December, 1858, the said Bank of Kentucky, the holder of the said note, by public act, passed before Theodore Guyol, a notary public in New Orleans, transferred the said note and cost of protest to them, the said Bogard, Foley & Avery, for and in consideration of the sum of seventeen thousand and sixty-eight dollars and thirty-three cents, being the amount of capital and in-
37 terest due on the said note at that date and the cost of protest, and also subrogated them to all the rights, actions, privileges, remedies, &c., &c., given to the holder by said act of sale, to which the said Bank of Kentucky was or might be entitled in the premises, as will more fully appear by an authentic copy of the said act here-

with filed, by which means the said Charles G. McHatton, as maker, and the said Irene Smith, as indorser, became bound and liable to pay to them the said sum of fifteen thousand dollars, with interest thereon at the rate of eight per cent. per annum, from the 30th day of March, 1857, until paid, and the said costs of protest.

And on further suggesting to the court that by the stipulations contained in the said public act of sale passed before the said Theodore O. Starke, notary public in and for the city of New Orleans, on the said 30th day of March, 1857, the said Charles G. McHatton mortgaged and specially hypothecated the undivided half of a
38 certain plantation or tract of land situated in the parish of East Baton Rouge, in this State, about two miles below the town of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to George O. Hall, and below by the plantation now or lately belonging to F. D. Conrad, and the undivided half of a certain other tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation just described, with all their buildings and improvements on the said two tracts of land, and various other property, as described in the said public act, to secure the said Irene Smith, or any subsequent holder of the said note, and of the other notes given by the said McHatton, in consideration of the price of the said sale, which said property, so mortgaged as aforesaid, is the same property now seized and advertised for sale under the authority of the court at the suit of the said Irene Smith, as aforesaid.

And on further suggesting to the court that they, the said
39 Bogart, Foley & Avery, instituted an action in the district court of the parish of East Baton Rouge on or about the 22d day of November, 1860, against the said Charles G. McHatton, on the said note held by them as aforesaid, to obtain a judgment thereon, and to have the said property mortgaged as aforesaid seized, and sold to satisfy the same; that a citation issued in the said suit was served personally on the said Charles G. McHatton on or about the 24th day of November, 1860; that afterwards the said McHatton filed an answer in the said case, but that owing to the troubles incident to the war growing out of the insurrection against the authority of the United States, the proceedings in the said district court of Baton Rouge have been interrupted; that the costs incurred in said suit and paid by petitioners amounted to the sum of , and that the said suit is still pending in the said court.

And on further suggestion to the court that the said Irene Smith, as well as the said Charles G. McHatton is indebted to them, in the said capacity of indorser on the said note, in the said sum of
40 fifteen thousand dollars, with interest thereon at the rate of eight per cent. per annum from the said 30th day of March, 1857, according to the tenor of the said note; that in virtue of the said mortgage, stipulated in the said public act, upon the said property seized and advertised for sale as aforesaid to secure the payment of the said note, they have a mortgage on the said property

which gives them a privilege, and that they are now entitled in law to be paid the said sum of fifteen thousand dollars, with the interest thereon at the rate of eight per cent. per annum from the 30th day of March, 1857, five dollars cost of protest, and , the costs incurred and paid by petitioner in the said district court of East Baton Rouge, in preference to the said Irene Smith, out of the proceeds of the sale of the said property.

It is ordered that the said Cuthbert Bullitt, marshal as aforesaid, retain in his hands, subject to the further order of the court, the proceeds of the sale of the said property seized and advertised for sale as aforesaid.

41 And it is further ordered, that the said Irene Smith, the plaintiff in the said seizure made in the above-entitled case, and the said Cuthbert Bullitt, marshal as aforesaid, may be notified hereof according to law, and that the said Irene Smith show cause on the tenth day of May, 1865, why the said sum of fifteen thousand dollars, ($15,000 00,) with eight per cent. interest per annum, from the 30th day of March, 1857, and the further sum of five dollars cost of protest, and of , costs of the said suit in East Baton Rouge, shall not be paid to them, the said Bogart, Foley & Avery, in liquidation, together with the costs of the proceeding, out of the proceeds of the said property seized, in preference to her, the said Irene Smith.

Patrick H. Foley, a member of the commercial partnership of Bogart, Foley & Avery, third opponents in the case of Mrs. Widow Irene Smith *vs.* Charles G. McHatton, No. 3,526 of the docket of the United States circuit court, eastern district of Louisiana,

42 being duly sworn, says, that the facts stated and set forth in the foregoing written motion for and in behalf of said third opponents in said case are true to the best of his knowledge and belief.

(Signed) P. H. FOLEY.

Sworn to and subscribed before me, this 26th April, 1865.

(Signed) F. B. VINOT, *D'y Clerk.*

5 cts. int. rev. stamp affixed and cancelled.

The foregoing motion and affidavit is respectively submitted to the court.

(Signed) MILES TAYLOR,
Of Counsel.

The name of W. Bogart struck out, in conformity to agreement filed May 3d, 1866.

(Signed) F. B. V.

Marshal's return on foregoing.

Received on the 3d of June, 1865, copy of the written intervention, together with the copy of an order of the said court, of date the 26th April, 1865, and also a copy of an order of court, of date
43 the 19th of May, 1865, postponing the trial of said intervention till the 26th June, 1865, which copies of intervention and orders of court have been by me served personally on Charles G. McHatton, at his residence, on the 7th inst., in the parish of East Baton Rouge.

Ret'd 12th June, 1865.

(Signed) WM. GRASS,
D'y U. S. Marshal.

Record No 2,808.—*Filed April 26th*, 1865.

To the honorable the judge of the sixth judicial district court, sitting in and for the parish of East Baton Rouge, State of Louisiana:

The petition of Wilhemus Bogart, William H. Avery, Patrick Foley, and [illegible] Conger, formerly composing the commercial firm of Bogart, Foley, Avery & Co., all residing in the city of New Orleans, respectfully represents, that Charles G. McHatton, a resident of the parish of East Baton Rouge, is truly and justly indebted unto your pe-
44 titioners in the full and entire sum of fifteen thousand dollars, with eight per cent. interest thereon from the thirtieth day of March, 1857, till paid, and the further sum of five dollars costs of protest to this, to wit: That on the 30th day of March, A. D. 1857, the said Charles G. McHatton did make and execute his certain promissory note, by which he promised, on the first day of May, 1858, to pay to his own order the sum of fifteen thousand dollars, with eight per cent. interest from the date of said note till paid. That immediately the said C. G. McHatton transferred the said note by special indorsement to Mrs. Irene Smith, or order, and the said Mrs. Irene Smith specially indorsed said note to the Bank of Kentucky through J. H. Bullen, its cashier.

That at its maturity said note was duly presented for payment at the Louisiana State Bank, the place of its payment, but there being no funds for its payment, the same was duly and legally protested and due, and legal notice thereof given to all the parties to said note.
45 And your petitioners aver that the bank of Kentucky being thus the holders and owners of the said protested note, did, on the tenth day of December, 1858, by public act before Theodore Guyol, a notary public, transfer to your petitioners the aforesaid note and costs of protest in consideration of the sum of seventeen thousand and sixty-eight dollars and thirty-three cents, being the amount in capital and interest and costs of protest of said note at that date, and the said Bank of Kentucky did then subrogate your petitioners to all the rights, actions, privileges, remedies, recoveries, and mortgages to which the said Bank of Kentucky in or might be entitled to, as the whole will appear from said act of subrogation, the copy of which is hereto annexed.

That the said note was given by the said Charles G. McHatton in part payment of the undivided half of the following described property which the said Mrs. Irene Smith did, upon the said 30th
46 day of March, 1857, by public act before Theodore O. Starke, a notary public in and for the city of New Orleans, sell and transfer to the said Charles G. McHatton, viz:

1. A certain plantation or tract of land situated in the parish of East Baton Rouge in this State, about two miles below the town of Baton Rouge, fronting on the Mississippi river, and bounded above by the plantation now or lately belonging to George O. Hall, below by the plantation now or lately belonging to F. D. Conrad, and in the rear by the lands hereinafter described, the said plantation having a front on the Mississippi river of twenty-two and a half arpents, more or less, by the depth thereunto belonging, according to the titles which are deposited in the office of the Consolidated Association of the Planters of Louisiana in this city.

2. A certain tract of land situated in the said parish of East Baton Rouge, containing four hundred arpents, more or less, adjoining the plantation above described, bounded on the east by lands of
47 Denis Daigre and Conrad; and on the west by the said first described tract; on the north by lands of J. and H. Perkins, together with all the improvements and buildings on the said two tracts of land, rights, privileges, and appurtenances thereunto belonging or in anywise appertaining, and all the horses, mules, cattle, sheep, hogs, carts, wagons, and farming utensils then used, and upon said lands; also the following slaves then employed on said lands:

John Johnson, aged 27; French Washington, 22; Minta, 22; Sam Johnson, 29; Bob, 23; Gift, 30; Easter, 30; Ben Roberts, 28; Martha, 22; Dick, 35; Simon, 30; Rosalla, 23; William Henry, aged 25; Manuel, 24; Kitty, 30; Charles Lombard, aged 28; Levi, 16; Rachel Cofe, 35; Abner, 35; Patrick, 13; Isabel, 30; Nelso Haly, 35; Warren, 29; Yellow Rachel, 26; George Johnson, 28; Benjamin, aged 30; Cooper, 25; George Ross, 38; Bill Gad, 28; John Beasley, 38; Wilson, 40; Adam, 25; Jeff, 24; Honore, 23; Ben Spaner, 24; Tom Sloan, 24; Hebert, 35; Fortune, 35; Marcus, 58; Sam Lee, 24; Joe, 24; Nelson Evans, 28; Charles, 22; Jessee, 21, John Carter, —; Frank, 17; Charlotte, 25; Buckman, infant; Auguste, 24; Big
48 Sarah, 28; Alexander, 1; Stephen, 34; Adeline, 24; Jim Brady, 26; Hypolite Sally Henderson, 23; Daniel, 50; John Lewis, 22; Lewis, 48; Lisbon, 24; Bill Sackly, 28; Sally Davidson, 23; Bohler, —; Eliza, 28; Mary Jane, 26; Sarah, 40; Mary Kentuck, 28; Margaret Remy, 28; Cares, 30; Yellow Louise, 24; Margaret, 14; Rachel Thogel, 40; Martha, 20; Rachel, 25; Rachel Lewis, —; Dally, 25; Frances, 10; Mary, 35; Ann, 29; Bob, 9; Breckenridge, inf't; Francis, 28; Ramie, 7; Elizabeth, inf't; Zabelle, 1; Susan, 20; Sophia, 9; Randall, —; Mary Georgetown, 25; Jinny, 3; Zeme, —; Mary Louise, 30; Anthony, 2; George, 8; Patsey, 20; Sylvarice, 2; Ellen, 7; and eighty shares in the capital stock of the Consolidated Association of the Planters of Louisiana.

That in order to secure the said Mrs. Irene Smith, or any other

subsequent holder of said note, the said McHatton did mortgage and specially hypothecate the undivided half of the aforesaid described lands, movables, and slaves, as will appear from said act of sale, a copy of which is hereto annexed for greater certainty, and
49 which was recorded in the parish of East Baton Rouge on the 15th April, 1857. Now petitioners show that on the 27th April, 1857, the said C. G. McHatton did sell the said undivided half of the said described property to William P. Saunders, and that afterwards the said Saunders having failed to pay the purchase money, the said Mrs. Irene Smith did cause the said undivided half of said property to be seized and sold, and on the 5th May, 1860, became the purchaser again of the said property, purchasing subject to the mortgage in favor of said note.

They therefore show that they have now upon the said land, slaves, and their increase, and movables aforesaid, a privilege and mortgage for the payment of said fifteen thousand dollars with eight per cent. interest, from the 30th March, 1857, till paid, as the whole will appear from the said act of sale from Mrs. Irene Smith to C. G. McHatton, sale C. G. McHattan to Wm. P. Saunders, and sheriff sale to C. G. McHatton to be produced upon the trial hereof.

50 That amicable demand has been made for the payment of said note, interest and protest without effect of the said C. G. McHatton.

Wherefore, the premises considered, petitioner prays that the said Charles G. McHatton may be duly cited to appear and answer this petition, and after all legal delay he may be decreed to owe and condemned to pay to your petitioners the aforesaid sum of fifteen thousand dollars, with eight per centum interest, from the 30th March, 1857, till paid, five dollars costs of protest, and that the mortgage and privilege be recognized upon the aforesaid property, and that the same be declared executory, and said property may be sold to pay and satisfy the said sum of fifteen thousand dollars, with eight per cent. interest per annum till paid, and costs of suit and general relief, &c., they will ever pray.

(Signed) BARROW & POPE,
Att'ys for Pl'ffs.

STATE OF LOUISIANA, *Sixth Judicial District Court,*
Parish of East Baton Rouge:

51 To Charles G. McHatton, esq., residing in the parish of east Baton Rouge:

You are hereby summoned to appear at the office of the sheriff of the parish of East Baton Rouge, and comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the clerk of the district court of the sixth judicial district for said parish, at the city of Baton Rouge, in ten days after the service hereof, allowing yourself one additional day for every ten miles that your residence may be distant from the city.

Witness the honorable Daniel D. Avery, judge of our said court, this 23d day of November, 1860.

(Signed) JOS. NEPHLER, *Cl'k.*

BOGART, FOLEY & AVERY,
vs.
C. G. McHATTON. } No. 2,808.

Rec'd certified copies of the within citation, petition, and
52 documents, hereto annexed, on the 23d day of November, A. D. 1860, and proceeded to the service hereof by delivering said copies to the defendant, C. G. McHatton, in person, in this parish, east Baton Rouge, on this 24th day of November, A. D. 1860.

(Signed) THOS. F. HERNANDEZ, [L. S.]
Dep. Sheriff.

STATE OF LOUISIANA, *Parish of East Baton Rouge,*
Fifth, late 6th, Jud'l Dist. Court:

CLERK'S OFFICE.

I hereby certify the foregoing to be true copies of the original petition, and citation and sh'ff's return thereon on file and of record in my office, entitled Bogart, Foley, and Avery, *vs.* C. G. McHatton, No. 2,808, of the docket of said court.

Given under my hand and the seal of said court, this 4th day of April, A. D. 1865.

(Signed) JOS. NEPHLER, *Cl'k.* [SEAL.]

5 cts. int. rev. stp. affixed and cancelled.

53 $15,000 00 NEW ORLEANS, *March 30th*, 1857.

On the first day of May, 1858, after date I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand dollars and cents for value received, with interest at the rate of eight per cent. per annum from date until final payment.

(Sig'd) C. G. McHATTON.

Written on the back of the note:
271 C. G. McHATTON.

15,000 4 MAY.

Pay Irene Smith or order.
(Sig'd) C. G. McHATTON.

Pay S. H. Bullen, cas., or order.
(Sig'd) IRENE SMITH.

No. 2,808. Filed November 22, '60.
(Sig'd) J. M. NELSON, *D'y Cl'k.*

B'k K'y, 2,470.

Ne varietur.
New Orleans, March 30th, 1857.
(Sg'd) THEODORE O. STARK, *Not. Pub.*

STATE OF LOUISIANA, *Parish of East Baton Rouge,*
Fifth, late 6th, Jud'l Dist. Court:

CLERK'S OFFICE.

54 I hereby certify the foregoing to be a true copy of the original note, together with the indorsements thereon on file and of record in my office in suit entitled Bogart, Foley and Avery *vs.* C. G. McHatton, No. 2,808 of the docket of said court.

Given under my hand and the seal of said court this 4th day of April, A. D. 1865.

(Signed) JOS. NEPHLER, *Cl'k.* [SEAL.]

5 cts. int. rev. stamp affixed and cancelled.

Certificate.—Filed April 26, 1865.

FIFTH, LATE 6TH, JUD'L DIST. COURT,
Parish of East Baton Rouge, Louisiana:

BOGART, FOLEY and AVERY,
vs.
C. G. MCHATTON. } No. 2,808.

CLERK'S OFFICE.

I, Joseph Nephler, clerk of the 5th judicial district court of the State of Louisiana for the parish of East Baton Rouge (late
55 sixth judicial district) do hereby certify that the above-entitled cause is now pending upon the trial docket of said court.

Given under my hand and the seal of said court at Baton Rouge, this 5th day of April, A. D. 1865.

(Signed) JOS. NEPHLER, *Cl'k.* [SEAL.]

5 cts. int. rev. stp. affixed and cancelled.

Act of subrogation marked D.—Filed April 26, 1865.

No. 128.—10th December, 1858.—Subrogation.—Bank of Kentucky, to Bogart, Foley and Avery.

Be it known, that on this tenth day of December, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-third, before me, Theodore Guyol, a notary public, duly commissioned and sworn for the parish of Orleans, State of Louisiana, and in presence of the witnesses hereinafter named and undersigned, personally
56 appeared William Logan McKnight, of this city, herein acting as the agent and attorney in fact of the Bank of Kentucky, located in the city of Louisville, State of Kentucky, by virtue of a power of attorney executed on the twenty-eighth day of July, 1854, and deposited in the office of Theodore O. Starke, a notary public, in

this city, on the fifth day of May, eighteen hundred and fifty-eight, who declared that, in his said capacity, he has this day received from Messrs. Bogart, Foley and Avery, of this city, the sum of seventeen thousand and sixty-eight dollars and thirty-three cents, being the amount in capital and interest, to this day, with costs of protest, of a certain promissory note for the sum of fifteen thousand dollars drawn by C. G. McHatton, to the order of, and indorsed by himself, and also indorsed by Irene Smith, dated New Orleans, March 30th, 1857, and made payable on the first day of May, 1858, at the Louisiana State Bank in this city, with interest at the rate of eight per cent. per annum from date until final payment; which said note is
57 identified with an act of mortgage passed before the said Starke, notary, on the thirtieth day of March, 1857.

In consideration whereof, the said appearer, in his said capacity, hereby transfers, assigns, and delivers the said promissory note to the said Bogart, Foley and Avery, herein represented by William H. Avery, one of the members of said firm, who acknowledges the receipt thereof.

And the said McKnight does moreover cede and transfer unto the said Bogart, Foley and Avery, all the rights, actions, privileges, remedies, recourses, and mortgages to which the said Bank of Kentucky is or may be entitled as holder of the said promissory note, but without any warranty on the part of the said bank, except as to the existence of the debt represented by said note, hereby fully authorizing and empowering the said firm to have, use, exercise, and enjoy the said rights, actions, &c., in the same manner and to the same extent that the said bank might or could have done.

Done and passed in my office, in the city of New Orleans, on
58 the day, month, and year first above written, in presence of William G. Latham and Paul Abat, witnesses, who have signed with the said parties and me, the notary, after reading the whole.

WM. H. AVERY.
WM. LOGAN McKNIGHT,
Agent Bank K'y.
THEO. GUYOL, *Not. Pub.*

P. ABAT.
W. G. LATHAM.

The foregoing is a true copy of the original act extant in the registers of Theo. Guyol, late notary public, which are in my possession and custody as his successor in office.

New Orleans, April 24th, 1865.

(Signed) FELIX McCULLOCH, [SEAL.]
Successor of Theo. Guyol, Not. Pub.

5 cts. int. rev. st'p affixed and cancelled.

Answer in record No. 2,808, marked F.—Filed 26th April, 1865.

SIXTH DISTRICT COURT,
East Baton Rouge, Louisiana:

59 BOGART, FOLEY & AVERY
vs.
CHARLES G. McHATTON. } No. 2,808.

And now appears in the honorable court aforesaid Charles G. McHatton, a resident of the parish and State aforesaid, and for answer to the petition herein exhibited against him, he saith that he admits his signatures to the note sued on and annexed to plaintiff's petition, bot has drawer and indorser thereof, but denies each and every of the other allegations in plaintiff's petition contained, and prays to be hence dismissed with his costs to be taxed. And for further answer, this respondent saith, that he specially denies that the plaintiffs are the legal holders or owners of the note sued on, or that they have any right, title, or interest therein. And for further answer respondent saith, that he did, on the thirtieth day of March, in the year eighteen hundred and fifty-seven, purchase the Gartness plantation, with the slaves thereon, and on the terms and conditions set forth in the act of sale from Mrs. Irene Smith to respondent, a
60 copy whereof is herewith exhibited and marked A.

And for further answer this respondent saith, that the note sued on annexed to the plaintiff's petition was made and executed in conformity with the stipulations of the contract of sale aforesaid, marked A.

And for further answer this respondent saith, that on the twenty-seventh day of April, eighteen hundred and fifty-seven, he did sell and convey to one William P. Saunders, then residing in the city of New Orleans, by public authentic act, passed before Samuel Skolfield, parish recorder in and for the parish of East Baton Rouge, the one undivided half of the aforesaid plantation and slaves mentioned and described in the act of sale marked A aforesaid, upon the terms and conditions therein expressed, as will more fully appear by the said sale, a copy whereof, marked B, is hereto annexed, and prayed to be taken as part of this answer.

And for further answer, this respondent saith, that among the other terms, conditions, and stipulations of the said contract of
61 sale, was and is the following, to wit: That the same was "made for and in consideration of the sum of ninety thousand dollars, in part payment of which, the purchaser has paid in cash the sum of fifteen thousand dollars and assumed the payment of the following described five promissory notes drawn by the said vendor to his own order, and by him indorsed, all dated the 30th day of March, 1857, and made payable at the Louisiana State Bank in New Orleans, as follows, to wit:

"Four for the sum of fifteen thousand dollars respectively, on the first day of May, in the years 1858, 1859, 1860, and 1861; and one for ten thousand dollars, payable on the first day of May, 1862, with interest at the rate of eight per cent. per annum from date till final

payment, the payment of which said notes and interest is secured by special mortgage upon the property, slaves, and so forth, herein conveyed, being the same notes given by the present vendor to the said Mrs. Smith, in part payment of the said undivided half interest, by the act of the 30th of March last, 1857, above referred to."

62 That the note sued on and annexed to plaintiff's petition is that referred to in the above-recited clause in the contract of sale from respondent to the said William P. Saunders, as becoming due and payable on the first day of May, in the year (1858) eighteen hundred and fifty-eight. That the said note was specially indorsed by your respondent to his vendor, the aforesaid Mrs. Irene Smith, and by her indorsed and deposited in the Bank of Kentucky for collection merely, and that the same was not negotiated in or by the Bank of Kentucky, and never was the property of the said bank, neither had the said bank any right to exercise any acts of ownership over the same, but that the same always remained, until the payment thereof, the property of the said Irene Smith, and should have been delivered to respondent, and that neither the Bank of Kentucky or its agent had any authority whatever to transfer the same to the plaintiffs or to subrogate them to her rights therein or to the

63 mortgage given by this respondent to secure the payment thereof.

That the plaintiff not having come into possession of said note until long after the same became due, and had been protested for non-payment, took the same, if it ever legally came into their possession, which is expressly denied, subject to all the equities which this respondent might or could set up against the same into whosesoever possession the same might have come.

And for further answer respondent saith, that true it is that the said Saunders not having complied with the stipulations and conditions in the aforesaid contract of sale from your petitioner to him, marked B, in not paying the instalments due on the first day of May, 1859, the said Mrs. Irene Smith did avail herself of the stipulations in said contract of sale, and did, on or about the 12th day of March, in the year eighteen hundred and sixty, sue out her executory process against the said William P. Saunders and against the undivided

64 half of the property aforesaid by her sold to the said McHatton, this respondent, and by him sold to the said Saunders, as described in thesaid acts of sale, marked A and B, and caused the same to be seized and sold to pay the instalment due by the said Saunders on the first day of May, in the year eighteen hundred and fifty-nine, to wit, the sum of fifteen thousand dollars and interest, then due thereon, in cash and on terms of credit to meet the subsequent instalments as they became due; that the instalment, payable first of May, 1860, of fifteen thousand dollars and interest became due before the said sale could legally be effected, and that your respondent at the sale, made in pursuance of the said executory process, became the purchaser of the whole interest of said Saunders in said plantation, slaves, &c., for the sum of sixty-seven thousand dollars, all of which will more fully and at large appear by the transcript of the record of the said suit of

Irene Smith against William P. Saunders, herewith filed and marked C, and that respondent was not and is not, by the terms and conditions of the said sale made at the suit of the said Irene Smith
65 against the said William P. Saunders, and against the property by him purchased as set in the contract marked B aforesaid, or in any manner, liable to pay to the petitioners or to any other person the amount evidenced by the note now sued on and annexed to plaintiff's petition; on the contrary, he avers that he acquired the same free form and lien, incumbrance, or mortgage, and that he is not individually or personally bound to pay the same, nor is the property so by him acquired, mortgaged, or in any manner liable for the same.

And for further answer respondent saith, that he utterly denies that the plaintiffs ever did pay or take up the note sued on at his request or for his use or benefit, or that they had any interest in paying the same.

And for further answer this respondent saith, that if the said plaintiffs ever paid the amount of the said note to the said Irene Smith, or to any one, or to any bank authorized to receive payment thereof, they did so at the request and for the use and benefit of the said William P. Saunders, and to aid and assist him in paying a
66 debt which he owed and had assumed and undertaken to pay to the said Irene Smith, as stipulated and agreed by him in the contract of sale aforesaid, marked B, and that the attempt on their part now to make this respondent liable for the same is illegal, wrongful, and unjust.

And for further answer this respondent saith, that he denies expressly that William Logan McKnight ever had any power or authority from the said Irene Smith or from the Bank of Kentucky to subrogate the plaintiffs or any other persons to her rights or to the rights of the said bank, if any they had, (which as before is denied,) in or to said note.

And for further answer this respondent saith, that he denies that he is indebted to the plaintiffs in manner and form as set forth in their said petition or in any other, and prays to be hence dismissed, with his costs and for general relief in the premises.

(Sgd.) MORGAN & MORGAN,
Att'ys for Resp'd't.

67 State of Louisiana, parish of East Baton Rouge, 5th, late 6th, jud'l district court.

CLERK'S OFFICE.

I hereby certify the foregoing to be a true copy of the original answer on file in my office in suit entitled Bogart, Foley and Avery *vs.* C. G. McHatton, No. 2,808 of the docket of said court.

Given under my hand and the seal of said court, at Baton Rouge, this 5th day of April, A. D. 1865.

(Signed) JOS. NEPHLER, *Cl'k.* [SEAL.]

5 ct. int. rev. stamp, cancelled.

Order on 3d opposition given at Chambers.—Rule filed and entered in the minutes April 26th, 1865.

U. S. circuit court, eastern district of Louisiana, at chambers.

MRS. WIDOW IRENE SMITH
vs.
CHA'S G. MCHATTON. } No. 3,526.

Ordered that the third opposition herein of Bogart, Foley
68 and Avery be filed, and that Cuthbert Bullitt, U. S. marshal, retain in his hands the proceeds of the sale of the property seized until further order of the court.

And it is further ordered that the said Irene Smith, plaintiff in the seizure made in the said case, and the said Cuthbert Bullitt, marshal, be notified thereof according to law, and that the said Irene Smith show cause, on the 10th day of May, 1865, at 11 o'clock a. m., why the third opponents should not be paid the amount claimed by them in preference to said seizing creditor.

New Orleans, April 26th, 1865.

(Signed) E. H. DURELL, *Judge.*

Service accepted. N. O., April 26th, 1865.

(Signed) A. BAUDOUIN, *Chief Deputy.*

Marshal's return on foregoing rule.

Received April 27th, 1865, and on the same day, month,
69 and year served a copy of the within rule and petition of third opposition accompanying the same on Fellows & Mills, esq'rs, attorneys for Mrs. Irene Smith, at their office on Commercial place, in this city, they accepting said service in behalf of Mrs. Irene Smith.

New Orleans, April 27th, 1865.

(Signed) A. BOISBLANC, *D'y U. S. M.*

Order and continuance of rule.

Circuit court of the United States, sixth judicial circuit, eastern district of Louisiana, April term, 1865.

NEW ORLEANS, *Wednesday, May 10th*, 1865.

Court met pursuant to adjournment. Present, Hon. Edw. H. Durell, district judge; absent, Hon. John Catron, presiding judge.

MRS. W'OW IRENE SMITH
vs.
CH'S G. MCHATTON. } No. 3,526.

The trial of the rule in this case is continued by consent of counsel to the 19th instant, at 11 o'clock a. m.

70 *Order and continuance.*

Circuit court of the United States, sixth judicial circuit, eastern district of Louisiana, April term, 1865.

NEW ORLEANS, *Friday, May 19th*, 1865.

Court met pursuant to adjournment. Present, Hon. Edw. H. Durell, district judge; absent, Hon. John Catron, presiding judge.

MRS. W'OW IRENE SMITH
vs.
CH'S G. MCHATTON. } No. 3,526.

This cause came up on the rule taken by 3d opponents, Bogart, Foley & Avery, on 26th April, 1865—J. Q. A. Fellows, esq., for Irene Smith, Miles Taylor, esq., for 3d opponents—when, upon suggestion of the plaintiff's att'y that the defendant Ch's G. McHatton has not been served with a copy of the 3d opposition, with the assent of the att'y for 3d opponents, it is ordered that the cause be continued till the 26th June next at 11 a. m., and that due service of the third opposition be made upon the defendant in the case.

71 *Motion and order for commission.—Extract from the minutes of 26th May*, 1865.

MRS. WIDOW IRENE SMITH
vs.
CH'S G. MCHATTON and BOGART, FOLEY & AVERY, third opponents. } No. 3,526.

On motion of Miles Taylor, esq., attorney for Bogart, Foley & Avery, third opponents in this case, and with the consent of Whitaker & Fellows, attorneys for the plaintiff, it is ordered that a commission issue herein directed to any commissioner for the State of Louisiana, or to any justice of the peace, notary public, or other officer authorized to administer an oath, in the city of Louisville, Kentucky, if not a Louisiana commissioner, his authority to be duly shown, to take the depositions of S. H. Bullen and others, witnesses to be examined on the part of said third opponents, to the interrogatories this day filed, and that the same be made returnable on or before the 26th June, 1865.

72 *Return to commission, mkd. G.—Filed June 21st*, 1865.—*Commission issued May 26th*, 1865.

Circuit court of the United States for the sixth judicial circuit, holding sessions in and for the eastern district of Louisiana.

To any commissioner for the State of Louisiana, or to any justice of the peace, notary public, or other officer authorized to administer an oath, in the city of Louisville, Kentucky, if not a Louisiana commissioner, his authority to be duly shown:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you

call and cause to come before you the witnesses named in the annexed interrogatories, and them duly examine on the annexed interrogatories, on oath, touching and concerning certain matters and things in a case now depending in the said court, wherein Mrs. W'ow
73 Irene Smith is plaintiff and Charles G. McHatton is defendant, and Bogart, Foley & Avery third opponents; and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ, on or before the 26th day of June, 1865.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New Orleans, this 26th day of May, anno Domini 1865, and the eighty-ninth year of the independence of the United States of America.

[SEAL.] CHARLES CLAIBORNE, *Clerk.*
(Signed) By F. B. VINOT, *D'y Clerk.*

Interrogatories and cross-interrogatories annexed to foregoing commission.

U. S. circuit court, E. D. of Louisiana.

MRS. IRENE SMITH
vs.
CHARLES G. M. HATTON and BOGART, FOLEY & Avery, third opponents.

74 Interrogatories to be propounded to S. H. Bullen and others, residing in the city of Louisville, Kentucky, witnesses to be examined on the part of Bogart, Foley & Avery, third opponents, under a commission issued in the above-entitled suit:

First interrogatory. Do you or do you not know the parties to the above-entitled suit? If yes, then state which of them, and how long you have known them, respectively, and at what place.

Second interrogatory. Examine the public instrument of protest made by A. Boudousquie, notary public, on the 4th day of May, 1858, hereto annexed, and marked A, and the copy of the note on the reverse thereof written, and the certificate of the service of the notice of the protest of the said note, and then state have you or have you not seen the original of said note. If you have, then state at what time you saw the said note, in what place, and in whose hands.

Third interrogatory. Do you or do you not know whose names were indorsed on the said note at the time you saw it? If you do,
75 then state whose name or names was or were indorsed on the same; and if you did know the said indorsement, then state how do you know them.

Fourth interrogatory. Do you or do you not know that a letter giving notice of the protest of the said note, and signed by the said A. Boudousquie, notary public, was received by the Bank of Kentucky, at Louisville, in the year of 1857, for Irene Smith, indorser on the said note? and if you know it was received, then state when it

was received. Do you or do you not know what become of the said letter giving said notice? If you do, then state what become of it. Do you or do you not know that it was delivered to the said Irene Smith? If you know it was so delivered, then state on what day it was so delivered, and how soon after it was received by the said bank.

Fifth interrogatory. Do you or do you not know to whom the said note was transferred by the Bank of Kentucky after the protest of the same? If you do, then state to whom it was transferred, and how you know it.

(Signed) MILES TAYLOR,
Att'y for B., F. & A.

76 Cross-interrogatories:

1st. If the answer to fifth interrogatory you state there was a transfer of said note, state when said transfer was made and what was the consideration; state all the particulars.

2d. In what you may state in answer to the direct interrogatories, state what is your own personal knowledge, and if any portions be from hearsay or other sources, tell from whom you heard the same and what were your sources of information; state fully. If you refer to any documents, please annex them to your answer.

(Signed) WHITAKER & FELLOWS,
Att'ys for Pl'ff.

I consent that a commission to take the depositions of witnesses in Louisville issue in this case without further formality, directed to any commissioner for the State of Louisiana or to any justice of the peace, notary public, or other officer authorized to administer an oath, in the city of Louisville, Kentucky; if not a Louisiana commissioner, his authority to be duly shown.

(Signed) WHITAKER & FELLOWS,
Attorneys for Pl'ff.

77 CLERK'S OFFICE.

True copies of the original on file in this office.
New Orleans, May 26th, 1865.
Attest: CHARLES CLAIBORNE, *Clerk.* [SEAL.]
(Signed) By F. B. VINOT, *D'y Clerk.*

5-ct. int rev. stamp, cancelled.

Protest, marked A, annexed to foregoing interrogatories.

STATE OF LOUISIANA:

By this public instrument of protest be it known, that on this fourth day of May. in the year one thousand eight hundred and fifty-eight, at the request of the cashier of and holder for the Citizens' Bank of Louisiana of the original note. whereof a true copy is on the reverse hereof written, I, Adolphe Boudousquie, a notary public in and for the city and parish of New Orleans, State of Louisiana, duly

commissioned and sworn, presented said note to the proper officer at the Louisiana State Bank, where the same is made payable, and demanded payment thereof, and was by him answered that no funds had been deposited there to pay said note.

78 Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said note as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interests suffered or to be suffered for want of payment of the said note.

Thus done and protested in the presence of William G. Latham and Louis Dubour, both of this city, witnesses.

In testimony whereof, I grant these presents, under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) A. BOUDOUSQUIE, [SEAL.]
Not. Pub.

5-ct. int. rev. stamp affixed and cancelled.

$15,000. NEW ORLEANS, *March 30th*, 1857.

On the first day of May, 1858, after date, I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand dollars, for value received, with interest at the rate of eight per cent. per annum from date until final payment.

C. G. McHATTON.

B'k K'y, 2,470.

Ne varietur:
New Orleans, March 30, 1857.
THEODORE O. STARKE, *Not. Pub.*

79 Indorsed: Pay Irene Smith, or order.
C. G. McHATTON.

Pay S. H. Bullen, cas., or order.
IRENE SMITH.

Pay E. Rousseau, cas., or order.
S. H. BULLEN, *Cas.*

I, the undersigned notary, do hereby certify that the parties to the note whereof a true copy is above written, have been duly notified of the protest thereof, by letters to them by me written and addressed, dated on the day of the said protest, and served on them, respectively, in the manner following, viz:

By enclosing the one for Irene Smith, indorser, in the one for S. H. Bullen, cashier, which I directed to him at Louisville, Ky., and also by directing the one for C. G. McHatton, drawer and indorser, to him at Baton Rouge, La., which letters I deposited prepaid in the post office in this city on the same day of said protest.

In faith whereof I have hereunto signed my name, together with

William G. Latham and Louis Datour, witnesses, at New Orleans, this fourth day of May, eighteen hundred and fifty-eight.

(Signed) A. BOUDOUSQUIE, *Not. Pub.*

80 *Deposition of James M. Clarke, in answer to interrogatories and cross-interrogatories annexed to commission.—Filed June 21st, 1865.*

The deposition of James M. Clarke, taken on the 10th day of June, 1865, at my office, in the city of Louisville, in Jefferson county, Kentucky, before me, Tho's Mitchell, a justice of the peace for said county, to be read as evidence in an action now pending in the United States circuit court, E. D. of Louisiana, in which Mrs. W'ow Irene Smith is plaintiff *vs.* Charles G. McHatton, defendant, and Bogart, Foley & Avery, third opponents:

In answer to all the interrogatories propounded, I state that I am clerk in the Bank of Kentucky, Louisville, and have been since 1856; that the original note for $15,000, of which a copy is attached to the interrogatories and commission, dated 30th March, 1857, signed by C. G. McHatton, was sent by the Bank of Kentucky to the Citizens' Bank, La., New Orleans, for collection, and to be credited
81 to Mrs. Irene Smith when paid, she being the holder of the same; that said note was sent to the said Citizens' Bank for collection and credit as af'sd on the 23d day of July, 1857, and matured on the 1st to 4th May, 1858, and on the 21st day of December, 1858, it was paid, and the whole amount, with interest, was placed to the credit of Mrs. Irene Smith, and she checked it out of bank.

The note seems to have been protested, from the mark in the margin of the note register, but there is no notice of the protest on file. If it ever was received, I do not know what became of it. Mr. Bullen, the cashier of the bank, who is now dead, was the agent and friend of Mrs. Smith, and had the note sent for collection for her, and if he ever received any notice of protest of it I do not know what he did with it, as it is not filed away. All that the books of the Bank of Kentucky show is that the note was sent to New Orleans on the 23d July, 1857, for collection, (not bought by the bank,) and that it was reported paid on the 21st December, 1858, and the whole amount credited to Mrs. Irene Smith, as stated above.

82 Answer to cross-interrogatories:

I have stated all I know about it, and my answer shows the source of information. I have no information of any transfer of the note ever being made by any person. The books of the bank do not show it, if it ever was done. I presume the note was paid by Mr. McHatton, as he was the person that signed it; at any rate it was paid, and so advised to the Bank of Kentucky at Louisville.

(Signed) JAMES M. CLARKE.

STATE OF KENTUCKY, *Jefferson County, sct:*

I, Tho's Mitchell, a justice of the peace for said county, whose office is in the city of Louisville, in the county aforesaid, do certify

that the foregoing deposition of James M. Clarke was taken before me, was written and subscribed by him, and read to him in my presence, at the time and place and in the action mentioned in the caption, the said James M. Clarke having been sworn by me that the evidence given by him is the truth, the whole truth, and
83 nothing but the truth, neither party, in person or by attorney, being present at the examination.

Given under my hand, this 10th day of June, 1865.

(Signed) THO'S MITCHELL, *J. P. J. C.*

5-ct. int. rev. stamp, cancelled.

STATE OF KENTUCKY, *Jefferson County, sct:*

I, J. Jack Coner, clerk of the county court in and for said county, do certify that Thos. Mitchell, esqr., whose genuine signature is subscribed to the above certificate, is, and was at the date thereof, an acting justice of the peace for said county, duly commissioned and qualified, and all his official acts as such are entitled to full faith and credit.

Given under my hand and the seal of said county, at office in Louisville, this 12th day of June, 1865.

(Signed) J. JACK CONER, *Clerk.* [SEAL.]

5-cts. int. rev. stp., cancelled.

COMMONWEALTH OF KENTUCKY,
Office of Secretary of State.

84 I, E. L. Van Wickle, secretary of state for the State of Kentucky, and keeper of the archives thereof, do hereby certify that Thos. Mitchel was on the 10th day of June, 1865, and is now, a justice of the peace in and for the city of Louisville and county of Jefferson, Ky., duly elected, commissioned, and qualified as such, and that all of his official acts are entitled to full faith and credit, and that said Mitchell is fully authorized to administer oaths.

Given under my hand and official seal, at Frankfort, this the 3d day of November, A. D. 1865.

(Signed) E. L. VAN WINKLE, [SEAL.]
Sect'y of State.
By JAS. R. PAGE, *Asst. Sect'y.*

COMMONWEALTH OF KENTUCKY,
Executive Department.

I, Thos. E. Bramlette, governor of the Commonwealth aforesaid, do hereby certify that E. L. Van Winkle is the secretary of
85 state for the State of Kentucky, and that Jas. R. Page is the assistant secretary, both duly appointed, commissioned, and qualified as such; that their certificate is in due form, and all of their acts are entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and caused the seal of the Commonwealth to be affixed. Done at Frankfort this the

3d day of November, A. D. 1865, and in the 74th year of the Commonwealth.

(Signed) THOS. E. BRAMLETTE, [SEAL.]
Govr. of Ky.

Special report of U. S. marshal.—Filed June 13, 1865, *m'k'd A.*

To the honorable Edward H. Durell, judge of the United States district court for the eastern district of Louisiana:

I hereby most respectfully report to you, in accordance with law, my doings and the proceedings had under the writ of seizure and sale issued and directed to me by the U. S. circuit court for the sixth circuit and eastern district of Louisiana in the suit of Mrs. W'ow
86 Irene Smith *vs.* Chas. G. McHatton, No. 3,526, and received by me on the 28th February, 1865, which proceedings are as follows, viz:

In accordance with said writ I seized and, after due proceedings as the law directs, advertised for sale the property described in the said writ, situated in the parish of East Baton Rouge, State La., and more fully described in the act of sale annexed to the petition filed in this suit; and after the said property had been duly appraised, and after due proclamations, viz, on the 29th day of April, 1865, at the hour of 12 o'clock m., the plaintiff, Mrs. Widow Irene Smith, being the highest and last bidder, became the purchaser of the said property for the price and sum of thirty-six thousand dollars. And on the 26th day of April, 1865, three days prior to said adjudication, I received an order from the aforesaid court that by the filing of a third opposition by Messrs. Bogart, Foley & Avery I was restrained from disposing of any proceeds of the sale of such property coming into my hands, or to grant a deed of sale conveying the said property to the purchaser thereof until further ordered by the court; and
87 the said opposition being still pending, and the legal delay for the return of said writ having expired, I now present this as my special return on the said writ, and retain the same according to law and by virtue of said order of court, in order hereafter to make my final return of said sale.

The whole of which is most respectfully submitted.

(Signed) A. BAUDOUIN, *Chief Dep'y.*

United States Marshal's Office,
New Orleans, 13th June, 1865.

Motion and order fixing third opposition for trial.—Extract from the minutes of 25th *January*, 1866.

MRS. W'OW IRENE SMITH
vs } No. 3,526.
CHS. G. MCHATTON.

On motion of Miles Taylor, esq., ordered that this cause be fixed for hearing on the intervention and 3d opposition on Wednesday, 7th February, 1866, at 11 a. m., and that the parties interested
88 be notified thereof.

Notice of trial.—Issued Jan'y 25th, 1866.

Circuit court of the United States for the sixth judicial circuit and eastern district of Louisiana.

MRS. W'OW IRENE SMITH
vs.
CHS. G. MCHATTON. } No. 3,526.

You are hereby notified that the intervention and 3rd opposition filed in this case is assigned for trial for Wednesday, the 7th day of February, 1866, A. D., at 11 o'clock a. m.

By order of court.

Witness my hand and seal of the said court, at New Orleans, this 25th day of Jan'y, A. D. 1866.

(Signed) F. B. VINOT, [SEAL.]
D'y Clerk.

To J. Q. A. FELLOWS, Esqr.

Marshal's return on foregoing.

Received January 26th, 1866, and on the 31st day of same month and year served a copy of the within notice on J. Q. A. Fel-
89 lows, esq., the attorney named herein, personally.

(Signed) M. EGAN,
D'y U. S. Marshal.

New Orleans, Feb. 1st, 1866.

Answer to 3rd opposition.—Filed Feb'ry 7th, 1866.

U. S. circuit court.

MRS. IRENE SMITH
vs.
CHS. G. MCHATTON. } No. 3,526.

And now comes the plaintiff herein, and for answer to the third opposition of Bogart, Foley & Avery, denies all and singular the allegations made by them, and further answering adopts as her answer all the allegations in an answer filed by Chs. G. McHatton to the petition of Bogart, Foley & Avery, in the district court of East Baton Rouge, alluded to in the petition of intervention herein, and prays that said intervention be dismissed with all costs.

(Signed) J. Q. A. FELLOWS, *Att'ys.*

90 *Affidavit of C. G. McHatton.—Filed January 7th, 1866.*

Chs. G. McHatton swears to the correctness of all the allegations of his answer to the suit of Bogart, Foley & Avery on file, except that one which alleges "that Bogart, Foley & Avery p'd the note for the use and benefit of Wm. P. Saunders," which words, as above quoted only, he does not know of his own personal knowledge, but has every reason to believe the same to be true, as they were the commission merchants and factors of Wm. P. Saunders, and he had

assumed the payment of this note, and had promised witness that Messrs. Bogart, Foley & Avery would see it paid for him.

(Signed) CHS. G. McHATTON.

Sworn to and subscribed before me, this 7 Feb'ry, 1866.

(Signed) F. B. VINOT, *D'y Cl'k.*

Note of evidence on intervention and 3d opposition.—Filed February 7th, 1866.

91 No. 3,526.—Note of evidence on trial of the intervention and 3d opposition of Bogart, Foley & Avery.

3d opponents offered—

The record and proceeding No. 2,808.

Doc'ts A, B, Doc. C, note and protest.

Doc't D, act of subrogation.

Doc't E, testimony of Rousseau.

Record marked F.

Testimony taken under commission, marked G. Certificate marked H.

P. H. Foley sworn for 3d opp'ts.

Alex. C. Bullitt sworn for pl'ff.

Chs. G. McHatton sworn for pl'ff.

The following documents referred to in foregoing note of evidence will be found respectively as follows, viz:

Doc't B, act of sale, at page 11.

Record and proceeding No. 2,808, at page 43.

Doc. D, act of subrogation, at page 55.

Record marked F, at page 58.

Doc. G, return to commission, at page 72.

Doc. A, special report U. S. M., at page 85.

92 Document C, offered in evidence February 7th, 1866.

Note.

$15,000 00. NEW ORLEANS, *March 30th*, 1857.

On the first day of May, 1858, after date, I promise to pay to the order of myself, at the Louisiana State Bank, fifteen thousand dollars and cents, for value received, with interest at the rate of eight per cent. per annum from date until final payment.

(Signed) CHS. McHATTON.

Indorsed: 271, C. G. McHatton, $15,000. 4 MAY.

Pay Irene Smith or order.

C. G. McHATTON.

Pay S. H. Bullen, cas., or order.

IRENE SMITH.

B'k Ky., 2,470.

Ne varietur.

THEODORE O. STARK, *Not. Pul.*

New Orleans, March 30th, 1857.

Protest.

UNITED STATES OF AMERICA, *State of Louisiana:*

By this public instrument of protest be it known, that on this
93 fourth day of May, in the year one thousand eight hundred and fifty-eight, at the request of the cashier of and holder for the Citizens' Bank of Louisiana of the original note, whereof a true copy is on the reverse hereof written, I, Adolphe Boudousquie, notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, presented said note to the proper officers at the Louisiana State Bank, where the same is made payable, and demanded payment thereof, and was by him answered that no funds had been deposited there to pay said note.

Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said note, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interest, suffered or to be suffered, for want of payment of the said note.

Thus done and protested in the presence of William G. Latham and Louis Dutour, both of this city, witnesses.

94 In testimony whereof, I grant these presents under my signature and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

(Signed) AD. BOUDOUSQUIE, *N. P.* [SEAL.]

$15,000. NEW ORLEANS, *March* 30, 1857.

On the first day of May, 1858, after date, I promise to pay to the order of myself, at the Louisiana State bank, fifteen thousand dollars, for value received, with interest at the rate of eight per cent. per annum from date until final payment.

(Signed) C. G. McHATTON.

Indorsed: Pay Irene Smith or order.

C. G. McHATTON.

Pay S. H. Bullen, cas., or order.

IRENE SMITH.

Pay E. Rousseau, cas. or order.

S. H. BULLEN, *Cas.*

B'k Ky., 2,470.

N. varietur.

THEODORE O. STARK, *Not. Pub.*

New Orleans, March 30, 1857.

I, the undersigned notary, do hereby certify that the parties to the original note, whereof a true copy is above written, have been duly notified of the protest thereof, by letters to them by me
95 written and addressed, dated on the day of the said protest, and

served on them, respectively, in the manner following, viz: By enclosing the one for Irene Smith, indorser, in the one for S. H. Bullen, cashier, which I directed to him, at Louisville, Ky., and also by directing the one for C. G. McHatton, drawer and indorser, to him at Baton Rouge, La.; which letter I deposited, prepaid, in the post office in this city on the same day of said protest.

In faith whereof, I have hereunto signed my name, together with William G. Latham and Louis Dutour, witnesses, at New Orleans, this fourth day of May, eighteen hundred and fifty-eight.

(Signed) L. DUTOUR.
W. G. LATHAM.
[SEAL.] AD. BOUDOUSQUIE, *N. P.*

Document E, testimony of E. Rousseau.—Offered in evidence February 7th, 1866.

MRS. WIDOW IRENE SMITH
vs.
CHARLES G. MCHATTON, BOGART, FOLEY & AVERY, third opponents.

96 Testimony taken by consent in the above-entitled case.

Eugene Rousseau, a witness examined on the part of opponents, says:

He is the cashier of the Citizens' Bank of Louisiana, in New Orleans, and has been so for the last sixteen years. He knows that S. H. Bullen was the cashier of the Bank of Kentucky, at Louisville; he was so in the year 1858, and was so for some years before and afterwards up to 1861. He knows this from the fact that the Citizens' Bank did business with and for the Bank of Kentucky, and that he, in his character of cashier, received letters from him during all of that time, written and signed by the said Bullen in his capacity of cashier.

Mr. Wm. Logan McKnight, of this city, was the agent of the Bank of Kentucky, transacting business for the said bank here in this city in the year 1858, and for a year or two prior to that time, during that year, and up to the time of his death.

97 A power of attorney from the Bank of Kentucky to W. Logan McKnight, authorizing him to transact all the business of the mother bank in Louisville, and of the branches at this point, was filed in the Citizens' Bank, as appears from an entry on the book in which entries are made, alphabetically, of the powers of attorney deposited in the bank. This book does not show the date when the said power of attorney was deposited or withdrawn. But he, the said Rousseau, says that he remembers the said power of attorney; that he saw it; that McKnight acted under it from the year 1857, and up to the time of his death, which took place in the winter of 1858–'9, as he thinks. He does not remember the date of the power, but it was deposited in the bank and McKnight acted under it during the year 1858, and up to the time of his death. The power of attorney was then withdrawn from the bank.

Under this power of attorney and as agent of the bank, the said W. Logan McKnight withdrew notes and other obligations belonging to the Bank of Kentucky, or its branches, from the Citizens' Bank, to make settlements with respect to them or to receive payments
98 on them; the sum of money paid into the Citizens' Bank for account of the Bank of Kentucky, or its branches, were drawn out by the said McKnight, on his own checks as agent under the said power, and he bought exchange on their account, and made remittances to them in the same manner as the officers of the said bank or branches could have done. He exercised full control in their business, collecting notes, making settlements with respect to them, and disposing of them just as the officers of the bank and of the branches could have done had they been here.

The note for $15,000 signed by Charles G. McHatton, and payable on the first day of May, 1858, and identified with a notarial act before Theodore Guyol, March 30, 1857, which is now exhibited to him, he says, was deposited in the Citizens' Bank for collection on account of the Bank of Kentucky; that it was not paid at maturity, and was protested for non-payment; and was afterwards withdrawn by W. Logan McKnight in his capacity of agent.

(Signed) EUG. ROUSSEAU.

99 Taken by consent, and affidavit waived.

(Signed) WHITAKER, FELLOWS & MILLS.

Document H, certificate.—Offered in evidence February 7th, 1866.

Fifth judicial district court, East Baton Rouge, Louisiana.

BOGART, FOLEY & AVERY
vs.
C. G. MCHATTON. } No. 2,808.

I, Joseph Nephler, clerk of the fifth judicial district court of the State of Louisiana for the parish of East Baton Rouge, do hereby certify that there is no cost due the clerk in the above cause, the same having been paid by the plffs to Messrs. Bloomfield and Steele, at my request, on or about June 8, 1861, nor do I believe that there are any costs due the sheriff for services rendered by him in the above cause.

Given under my hand and the seal of said court, this 6th May, A. D. 1865.

(Signed) JOS. NEPHLER, *Cl'k.* [SEAL.]

5-cts. int. rev. stp. affixed, cancelled.

100 Clerk's fee, $1 00, paid by Geo. A. Pike, esq.

(Signed) JOS. NEPHLER, *Cl'k.*

Hearing, order, and continuance of 3d opposition.—Extract from the minutes of February 7th, 1866.

MRS. IRENE SMITH
vs.
CH'S G. MCHATTON. } No. 3,526.

This cause came up for trial on the intervention and 3d opposition of Bogart, Foley & Avery. Whitaker & Fellows, for plaintiff. Miles Taylor, esq., for 3d opponents.

When, after hearing the pleadings and the evidence, ordered that the cause be continued till to-morrow at 11, a. m., that a summon issue directed to W. Saunders, requiring him then and there to appear and give his testimony in this case, and that another summons issue addressed to W. H. Avery, requiring his appearance at the aforesaid day and hour, and to bring into court the books of the firm of Bogart, Foley & Avery showing the entry relating to the
101 subject-matter in dispute in this case.

Summon to W. Saunders.—Issued Feb'ry 7th, 1866.—No. 3,526.

Circuit court of the United States, sixth judicial circuit, holding session in and for the eastern district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, to execute and return.

To W. Saunders:

You are hereby commanded to be and appear before a circuit court of the United States in and for the sixth circuit and eastern district of Louisiana, to be holden at the city of New Orleans, on the eighth day of February, 1866, then and there to testify the truth, according to your knowledge, in a certain case now pending therein, and to be tried, between Wow. Irene Smith and Ch's G. McHatton, at 11 o'clock a. m., and herein fail not, under the penalty of two hundred and fifty dollars.

102 Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New Orleans, this 7th day of February, in the year of our Lord one thousand eight hundred and sixty-six, and in the 90th year of American independence.

(Signed) F. B. VINOT, *D'k Clerk.* [SEAL.]

Marshal's return.

Not found.

Summon to Wm. H. Avery.—Issued Feb'ry 7, 1866.—No. 3,526.

Circuit court of the United States, sixth judicial circuit, holding session in and for the eastern district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, to execute and return.

To Wm. H. Avery, and to bring with you the books of Bogart, Foley & Avery showing the entry of the transaction relating to this case.

103 You are hereby commanded to be and appear before a circuit court of the United States in and for the sixth circuit and eastern district of Louisiana, to be holden at the city of New Orleans on the 8th day of February, 1866, then and there to testify the truth, according to your knowledge, in a certain case now pending therein, and to be tried, between Wow. Irene Smith and Ch's G. McHatton, at 11 o'clock a. m., and herein fail not, under the penalty of two hundred and fifty dollars.

Witness, the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city New Orleans, this 7th day of February, in the year of our Lord one thousand eight hundred and sixty-six, and in the 90th year of American independence.

(Signed) F. B. VINOT, *D'y Cl'k.* [SEAL]

Marshal's return.

Received 7th February, Wm. H. Avery, left for him at the office of Bogart, Foley & Avery, 38 Perdido street.

104 W. Sanders could not be found.

September 8, 1866.

(Signed) M. EGAN, *D'y U. S. Marshal.*

Hearing and submission of 3d opposition of Bogart, Foley & Avery.—Extract from the minutes of 8th February, 1866.

Mrs. Wow. Irene Smith
vs.
Chs. G. McHatton. } No. 3,526.

This case was resumed on the intervention and 3d opposition of Bogart, Foley & Avery.

Whitaker & Fellows for plaintiff; Miles Taylor, esq., for opponents.

And after hearing further evidence and argument, the court took time to advise, allowing the plaintiff's attorneys to furnish their authorities within 10 days.

105 *Brief for 3d opponents, Bogart, Foley & Avery.—Filed April 4, 1866.*

United States circuit court, eastern district of Louisiana.

Mrs. IRENE SMITH
vs.
CHARLES G. MCHATTON and BOGART, FOLEY, AVERY & Co., third opponents. } No. 3,526.

Brief for Bogart, Foley, Avery & Co.

Mrs. Irene Smith, the plaintiff in the action, sold a plantation situated in the parish of East Baton Rouge to the defendant, McHatton, by public act, passed before T. O. Starke, a notary public in the city of New Orleans, on the 30th of March, 1857, for the price of $80,000, of which $10,000 was paid in cash at the time of passing the act of sale, and the remaining $70,000 was represented by five promissory notes, dated on the day of the passage of the act, four for the sum of $15,000 each, and payable, respectively, on the 1st day of May, 1858, 1859, 1860, and 1861, and one for the sum of $10,000,
106 payable on the 1st day of May, 1862. All of these notes were made by McHatton, the purchaser, payable to his own order, and were by him indorsed and delivered to Mrs. Smith, the seller, after having been paraphed and marked "ne varietur" by the notary, to identify them with the act of sale, and by the stipulations contained in the act of sale; the property was specially mortgaged and hypothecated to secure the payment of the notes and of interest to accrue on them.

Some time after his purchase of the plantation in question, McHatton sold an undivided half of the property to a Mr. Saunders, who bound himself to McHatton to pay a portion of the notes given by him, McHatton, as a portion of the price, and the plantation was carried on afterwards in the name of McHatton and Saunders.

The third opponents, Bogart, Foley, Avery & Co., were the factors for the plantation, and, in the capacity of factors, kept three
107 accounts of their business transactions with the owners, viz: one with McHatton and Saunders in their firm name as partners in the plantation, and one with each of them individually.

Before the note of McHatton, for $15,000, payable on the 1st of May, 1858, arrived at maturity, it was placed by Mrs. Irene Smith in the Bank of Kentucky, at Louisville, for collection, after having been indorsed by her. The Bank of Kentucky sent the note with the indorsement filled up so as to make it payable to the cashier of the bank, to the Citizen's Bank, in the city of New Orleans, for collection. When this indorsement was filled up does not appear. On the last day of grace the note was duly presented for payment, and after an ineffectual demand of payment, it was protested for non-payment, at the request of the Citizen's Bank, and the Bank of Kentucky and Mrs Smith were notified of the protest.

108 Upwards of seven months after the protest of the note, the

agent of the Bank of Kentucky, Mr. W. Logan McKnight, withdrew the note from the Citizen's Bank, where it had remained from the time of the protest, and on the 10th day of December, 1858, in his capacity of agent and attorney in fact of the Bank of Kentucky, the holder of the note, by public act passed before Theodore Guyol, notary public, a copy of which is in evidence, for and in consideration of the sum of $17,068 33, the full amount of the principal and interest of the note at that date, and of the costs of protest, transferred and assigned the note in question, which is described as indorsed by Mrs. Irene Smith, and as held by the bank, to Bogart, Foley, Avery & Co., "with all the rights, actions, privileges, remedies, recourses, and mortgages to which the said Bank of Kentucky is or may be entitled, as the holder of said promissory note, but without any warranty on the part of the bank except as to the existence of the debt," etc.

109 The third opponents had been informed that the Bank of Kentucky, the holder of the note, was pressing McHatton, the maker, for payment; and as they had means to invest, and were desirous of favoring McHatton & Saunders, who were their customers, by giving them another creditor, they purchased the note, because they considered it a good investment.

When they made the purchase they believed the Bank of Kentucky to be the real owner of the note, and had no knowledge whatever that it was the agent of Mrs. Smith, or that Mrs. Smith stood in any other relation to the bank than that of an indorser to it for a valuable consideration.

The third opponents instituted a suit against Charles G. McHatton, in the district court of East Baton Rouge, in November, 1860, to recover the amount due upon the note, and this action is still pending in that court, its progress having been interrupted by the disturbed condition of the country during 1861 and several succeeding years.

110 On the 28th day of February, 1865, and while the interruption of judicial proceedings in East Baton Rouge still continued, the plaintiff, Mrs. Irene Smith, instituted proceedings to enforce the payment of the two notes of $15,000 each, payable in 1860 and 1861, and of the note of $10,000, payable in 1862; and the plantation was seized and advertised for sale under the authority of the court to satisfy these three notes. At this stage of the proceedings Bogart, Foley, Avery & Co. came forward, and by third opposition, claim to have a privilege on, and to be entitled to be paid by preference out of the proceeds of the sale of the property seized, the principal of the note held by them amounting to $15,000, with interest thereon at the rate of 8 per cent. per annum, from the 30th March, 1857, and the further sum of $5, the cost of protest, and the costs of the suit before instituted in the district court of Baton Rouge, on the following grounds, viz:

111 1st. That they had a mortgage on the property seized, as the holders of the note in question under the transfer made to them by the Bank of Kentucky on the 10th of December, 1858, and

2d. That Mrs. Irene Smith, the seizing creditor, was bound and liable, as indorser on the note, to pay the amount due upon it, and therefore could have no right, either in law or equity, to any portion of the proceeds of the sale of the property until after the debt due to the third opponents, and for which she was personally bound, had first been fully paid and satisfied.

Since the third opposition was filed, the property seized and advertised for sale has been sold at public sale, and was adjudicated to Mrs. Irene Smith, the plaintiff, in the order of seizure and sale, for the price of $36,000; and she now contends that the claim of the third opponents must be rejected—

1st. Because the Bank of Kentucky was the mere agent of
112 Mrs. Smith, the real owner, from whom the bank had received it for collection, and was therefore without any authority to sell or transfer the note to a third party; and

2d. Because the third opponents, having received the note after it was protested for non-payment, were in law subjected to all the equities between Mrs. Irene Smith and the Bank of Kentucky.

The plaintiffs' counsel, in the brief submitted by him, has cited various authorities against the third opponents' right to recover in support of these two positions; but I think it will be found, upon an examination of these authorities, that they do not sustain the positions taken by him in his argument; and that upon an examination of the facts of the case it will be seen that the positions themselves have no necessary connexion with the real question involved in the present contest.

The first authority cited is the case Whitwell *et al. v.* Crehore, ex., 8 L. R., 542. In that case the plaintiffs were the indorsees of
113 T. K. Jones & Co., and it was set up in the answer, in an action instituted by the indorsees of T. K. Jones & Co. against the succession of a prior indorser, that C. D. Jordan, whose executor was sued, had indorsed the note for the accommodation of T. K. Jones & Co., without receiving any consideration; that the drawers of the note having failed, T. K. Jones & Co. took up the notes after protest, and were believed to be then the true owners of them, and that the plaintiffs received the notes after their dishonor, well knowing the understanding between C. D. Jordan and T. K. Jones & Co., for whose accommodation they were indorsed by him without consideration. See statement of the case ps. 540, 541.

In the case now before the court a full consideration was paid by the holders, and they had no knowledge whatever (at the time of the transfer) of any right, title, or interest of Mrs. Smith in the note.

The next case is that of Lapice *vs.* Clifton, 17 L., 152. In that case the contest grew up in relation to a note made by Clifton
114 in favor of R. J. Walker, who continued to be the real owner of the note, and placed it in the hands of the plaintiff as collateral security, to indemnify him against certain liabilities, long after it fell due. Upon a final settlement between Walker and Clifton, Walker agreed to deliver up this note to Clifton; but Lapice, the plaintiff, refused to give it up, and brought suit upon it to enforce its payment against Clifton, the maker; and the court held:

1st. That Walker was the owner of the note. 2d. That it was only deposited with Lapice as collateral security. 3d. That Clifton had no notice of a transfer of the note before the maturity. And 4th. That though "the indorsement and delivery of a promissory note, as a general rule, transfers the property," etc., they could "not admit every deposit and indorsement of notes as collateral security, as transferring such an absolute property in them as to deprive the payer or depositor of all right, and the maker of every defence he may have against them previous to notice of the deposit or pledge."

In that case there was no privity or relation of agency be-
115 tween Clifton, who resisted the payment, and Walker, who made the deposit of the note with Lapice as collateral security.

The cases 1 N. S., 605, 2 N. S., 699, 182, 119, and 5 A., 153, 516, were all actions by holders, receiving them after their dishonor, against the makers of the respective obligations, in which the makers were permitted to set up the equities existing between them and prior parties to the note, on the ground that the fact of their being dishonored was notice of the existence of equities, etc. But here the question is between the drawer and an indorser, and the reason for the rule fails. The rule is based upon the principle that when one binds himself by a negotiable instrument to pay a sum of money on a particular day, and fails to do it, it is because he has a off-set, or some other good ground for refusing. But the indorser does not so bind himself, and the failure of the maker to pay does not raise such a legal presumption in his favor. Nor have the cases in 19 L., 542, 472, and 1 R. 39 any real application.

The counsel, however, asserts that the fact that the third
116 opponents received the note from a bank is against them; that "the figures on the back of the note show that it was deposited for collection, and was not the property of the bank." What this assertion is based on I cannot imagine.

The case of the Bank of Washington *vs.* Triplett & Neale, reported in 1 Peters' R. 30, is cited by him at this point, and a passage from it is quoted at length in his brief, as if it really established that position. But on referring to the case it will be seen that it does nothing of the kind.

In that case Triplett & Neale placed a bill, of which they were the payers, in the Mechanics' Bank of Alexandria, for transmission to some bank in Washington for collection. The bill was not collected, and Triplett & Neale brought suit against the Bank of Washington, to which it had been sent, to recover the amount of the bill from the bank, on the ground that the bank had not used reasonable diligence to collect the money, and that it had neglected to present the bill,
either for acceptance or payment, and to have the same pro-
117 tested; and that thereby the plaintiffs had lost their recourse on the drawer. In the progress of the case it was insisted on that certain instructions to the jury, asked for in the lower court, to the effect that there was no privity between the real holder of the bill and the Bank of Washington ought to have been given. This

instruction was asked for because Triplett & Neale had indorsed the bill in blank on delivering it to the Mechanics' Bank of Alexandria, and the bill had afterwards been indorsed by the cashier of that bank to the order of S. Elliott, esq., who was cashier of the Bank of Washington, to which it was sent by mail. In commenting upon that part of the case, Chief Justice Marshall, who delivered the opinion of the court, said that "the bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington to be collected. That bank would, of course, become the agent of the holder. By transmitting the bill, as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection was devolved upon the bank which received the bill
118 for that purpose. The Mechanics' Bank was the mere channel through which Triplett transmitted the bill to the bank in Washington." And then the court makes use of the language, of which the citation made by the counsel of Mrs. Smith is a part, to show that under the facts of the case the Bank of Washington had no more reason for supposing the Bank of Alexandria to be the owner, because Triplett & Neale had indorsed it, than it had for supposing that the cashier of the Bank of Washington had become the real holder by its indorsement to it.

The ownership of a negotiable instrument is in all instances a question of fact. It may be transferred by indorsement of the owner to a mere agent for collection; but it is also transferred by indorsement in the same manner by the owner, for a valuable consideration, to a new owner. Whether such transfers by indorsement are for one purpose or the other are questions of fact, to be determined in
119 the event of dispute by extrinsic evidence; and the court, in the case referred to, only recognized this truth; for, in this case, the fact that the note was only transferred in order to effect its collection was shown by the evidence. Nor do I think that any one will seriously maintain the contrary after reading the facts of that case, and the more especially when it is remembered that our courts everywhere consider possession of a note or bill of exchange under an indorsement of the payer as a ground for the presumption of ownership in the holder, in the absence of contrary proof. In the present case not only was the indorsement of the note by Mrs. Irene Smith, made in the way in which it would have been made if it had been the intention to assign it to a new owner, but the agent of the bank asserted that the bank was the holder of it, and after mentioning that it was indorsed by Mrs. Irene Smith, and that it had been protested, specially transferred it to the present holders, with
120 with all the remedies, recourses, etc., to which the Bank of Kentucky was or might be entitled to as the holder of the same.

The counsel of the plaintiff seems quite as unfortunate in his citation of article 2,158 of the code, and of the decision in the case of R. A. Upton *vs.* Joseph Welsh, by the supreme court of Louisiana, which he presents in manuscript. The provisions in articles 2,155, 2,156, and 2,157, which are referred to in article 2,158, have no ap-

plication to cases of the transfer and assignment of notes payable to order, like the one before the court.

By becoming a party to a negotiable instrument, Mrs. Irene Smith became subject to all the obligations imposed by the law on parties to such instruments; and when she indorsed the note and transferred it to another by her indorsement, she at once became liable to be made responsible to any subsequent holder in the event of its not being paid at maturity.

121 The fact that the note was identified with a notarial act and its payment secured by a mortgage on immovable property, in no degree affected the character of the note.—(12 M., 235; 3 L., 241; 7 L., 571; 8 R., 435.)

It is true that the obligation of the mortgagor as to the mortgage itself, with respect to the holders of notes the payment of which is secured by mortgage, may be governed by different rules from those operating on negotiable paper, as mentioned by the court in the case of Schmidt *vs.* Frey, 8 R., 435; but no such question can arise in this case, because the present contest is not between the mortgagor, but between the original mortgagee and a subsequent holder of a mortgage note, any subsequent holder of which, it was expressly stipulated in the act of mortgage, should become entitled to exercise her rights of mortgage.—(See copy of sale from Mrs. Irene Smith to McHatton.)

122 Nor does the decision of the supreme court of Louisiana, cited by the counsel, sustain his position that the transfer of the note to a third party cannot, under article 2,158 of the civil code, injure the right of plaintiff to be paid what remains due on the mortgage in her favor in preference to the third opponents. On reference to a copy of the decision presented by plaintiff's counsel, it will be seen that that case has no feature in common with that before the court. In that case the action of the transferee was against the party from whom he received the note, and with whom he entered into a special agreement at the time of receiving the transfer, that he, the transferee, should have no "recourse" upon it against him.—(See page 1 of the manuscript decision of the case of R. A. Upton *vs.* Joseph Welsh.)

In the present case the Bank of Kentucky, from whom the third opponents received the note, stated in the act of transfer that the note was indorsed by Mrs. Irene Smith, and that it had been protested; and expressly transferred it, with the rights of re-

123 course against the other parties to it to which the bank might or could be entitled as holder.

I have now noticed the various arguments and all the evidence presented by the opponents' counsel, and shown that they have no application to the case before the court; and I will proceed to the real, and, as I think, the only question in the cause.

The evidence in the cause shows, beyond all manner of doubt, that the third opponents gave a valuable consideration to the Bank of Kentucky, actually paid at the time of the transfer of the note to them; and that they received it in good faith, and without any notice

of the existence of equities on the part of the maker of the note, or of any infirmity or defect in the title to it. Under the facts, as established by the evidence, nothing can be more certain than the right of the third opponents to recover, if the transfer to them had been made before the maturity of the note.—(Story on promissory notes, §§ 191, 192, et seq.)

124 But the third opponents received the note seven or eight months after it fell due and had been protested for non-payment, and the plaintiff now insists that a note so received is subject in the hands of the holder to any equities which may exist in favor of any of the prior holders; and the question then arises: Are there any equities in existence which preclude the third opponents from recovering the amount due according to the tenor of the note, and from enforcing its payment against the proceeds of the sale of the mortgaged property?

There is no equity set up in favor of the maker of the note growing out of a failure of consideration, or of any other matter which could be opposed to any holder; nor does the plaintiff allege that she has any claim of any kind or description against the third opponents personally.

Her single defence is founded upon the allegations that she was the real owner of the note; that the Bank of Kentucky was her agent for its collection; that the bank was only authorized to

125 receive payment in satisfaction of the note, and had no right whatever to transfer and assign the same to a third party; and that in consequence of this want of right in the bank, no title to the note was ever vested in the third opponents, so that they are without any right or title to the note, and are incompetent to maintain an action upon it. Is this a good defence? I think it is clear that it is not.

In the ordinary course of things the holder "of a note" is presumed to be prima facie a holder for value.—(Story on promissory notes, § 196.)

If a note is indorsed in blank, the title to it passes from the indorser by mere delivery; and a consequence of this is that if the note is transmitted to an agent for the purpose of collection or negotiation, he may either fill up the blank, and make it payable to himself, or he may fill up the blank, as agent of his principal, in the name of a third person.

In the former case, he may sue as owner or transfer it to a

126 third person.—(Story on promissory notes, § 137.)

In cases of promissory notes held by banks, "an indorsement thereof by the cashier of a bank in his official capacity is sufficient to pass the title of the bank thereto."—(Story, on promissory notes, § 127.)

In the present case the note was indorsed by Mrs. Irene Smith, and the legal title to it was vested in the bank. The bank, through its agent, represented itself to be the holder of the note, and transferred and assigned it to the third opponents for a valuable consideration, and in the full belief that the bank was the legal holder of it, and authorized to transfer and assign it so as to give to the third

opponents a recourse both against the maker and Mrs. Irene Smith, the indorser.

It is now, however, shown that the Bank of Kentucky was her agent, and not the owner of the note; and this is shown for the first time by the evidence adduced on the trial. What were the instructions given by her to her agent, if any, are not known; nor
127 can it ever be, for the cashier, Mr. Bullen, to whom the note was originally given by the plaintiff, and Mr. W. Logan McKnight, who acted for the bank in making the transfer and assignment to the third opponents, are both dead. It is not only possible, but very probable, that the bank acted in accordance with her wishes in transferring the note to the third opponents. It is in evidence that the maker, Mr. McHatton, and Mr. Saunders, who had assumed to pay the note, had failed to make the payment when it fell due; and that they were unable at any time afterwards to pay it. The plaintiff needed money; she was travelling in Europe, and required it. The bank was unwilling to discount the note, and nothing would have been more natural, under the circumstances, as the mortgage in the then condition of the country was considered as an adequate security for the whole price of the property sold, than that the plaintiff should have instructed the bank, if it were unwilling to
128 lend money on the note, to find some one that was.

But however that may be, I consider it certain that the plaintiff, both in law and equity, is bound by the action of the bank, so far as to the third opponents, and that they were entitled to exercise all the rights attached to and connected with the note, as fully and completely as though she herself had transferred it to them for the consideration paid. If the bank was the agent of the plaintiff she is responsible for its acts so far as the third opponents are concerned. She indorsed the note in blank, and delivered it to the bank as her agent. This gave the bank the right to fill up the blank indorsement, and to sue upon it as owner, or to transfer it to a third person.—(Story on promissory notes, §§ 137, 196.) The authority thus given was general and unlimited. By her own act she held out the bank to the public at large, and to the third opponents in particular, as having authority to transfer the note as the legal holder of it.

129 In such cases good faith requires that the principal should be bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he, who, without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury rather than the innocent party, who has placed confidence in him.—(Story on Agency, §§. 126, 127, 128.)

Here the plaintiff, by her own act, authorized and enabled the Bank of Kentucky to act as the owner of the note, without discovering the fact that it was an agent, and in point of fact the third opponents dealt with the bank in the character of a principal, and with-

out having any reason whatever to suppose that it was not so in reality. This circumstance does not weaken the position of the third opponents as to the plaintiff, but gives it great additional strength.

130 The general principle laid down in Story on Agency is recognized in many decisions; here I shall content myself with referring to two only, viz: the case of Hunter *vs.* Hudson River Iron and Machine Company, 20 Barbour's reports, 506, 507, and that of the Commercial Bank of Buffalo *vs.* Kortright, 22 Wendell's reports, 348, 361, et seq.

In the case of Hunter *vs.* Hudson River Iron and Machine Company, 20 Barbour's reports, the court say: "A principal is liable for the fraud or misconduct of his agent; and he not only cannot take any benefit from a misrepresentation fraudulently made, but is bound to make the party compensation for the injury sustained. And this, although he may be innocent, provided the agent acted within the scope of his authority.—(p. 506)

Here, the agent of the plaintiff, the bank, was vested by the plaintiff with the legal title to the note, and with authority to trans-

131 fer it as the holder, and she is therefore liable "upon the principle, that of two innocent parties, the one shall suffer who, by his agent, causes the injury, and will in all such cases receive the least harm."—(p. 507.)

In the case of the Commercial Bank of Buffalo *vs.* Kortright, 22 Wendell's reports, a stock certificate was entrusted by Barker to one Barlow, for the purpose of borrowing money on its security, and the certificate was accompanied with such an authority to transfer "as would hold out Barlow to any one to whom he might apply for a loan, in the character of an agent having full right to transfer, or to substitute some other person as the attorney for that purpose."

"The precise use Barton was expected to make of the stock, and the different use he may have actually made, were nothing to the purpose as against those who acted upon the faith of the general authority intrusted to the holder of the certificate and its blank indorsements.

Here the court cite, with approbation, Story on Agency, §§ 127, 133, and the authorities cited in the notes to these paragraphs.

132 And the court then proceed to say that the party entrusting Barton with the certificate, etc., "held" him "out," or whomsoever he should substitute to himself, as authorized to make any disposition of the stock whatever. Barton was intrusted with what Lord Ellenborough, in a well-known leading case on the law of agency, 15 East., 44, expressly terms "the usual external indicia of the right of disposing of the property."

On the faith of these external indicia Kortright lent $25,000, etc. If the law should now hold this transaction to be void, it would indeed, as Judge Story says, "operate as a fraud upon the unsuspecting confidence of the other party."

If the holder of the certificate and the power has been voluntarily exhibited to the money-dealing public as having the competent right of pledge, disposal, and transfer vested in him by means of all the

usual and well-known evidences of such right, the private un-
133 derstanding of Barker and Barton, etc., cannot affect the rights of those who, if misled, were misled by Barker's own acts.—(pp. 360, 361.)

And again, the court say, on page 368 of the same opinion, "the loan was honest and friendly, and, as one of the two parties, Kortright or Barker, one or the other must ultimately suffer, the true inquiry will be that which Judge Bullen says is the common question every day in Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third—which of the two gave credit?" Here Barker trusted Barton, and enabled him to gain credit from others, and whoever stands in Barker's place takes his responsibility.

And on the other hand, to what did Kortright give credit? First, to the bank, its certificate and the forms of transfer thus held out; second, he trusted Barker's name and seal, duly attached and signed to a paper written by his authority. Who of these parties ought to suffer?—(p. 368.) And the decision of the court made Barker
134 responsible, and recognized the acts of his agent as valid and binding on him.

And now, I would ask, is not the case before the court at least as strong? Did not the third opponents advance $17,065 33 on the faith of the external indicia of the right of disposing of the note in question, with which the bank of Kentucky was intrusted by the plaintiff? And are not the third opponents clearly entitled to a judgment recognizing them as the legal holder of the note transferred and assigned to them by the bank of Kentucky, and as such entitled to be paid the full amount due upon it out of the proceeds of the property sold in this case, in preference to the plaintiff?

All of which is respectfully submitted.

(Signed) MILES TAYLOR, *of Counsel*.

135 *Brief for plaintiff.—Filed April 5th*, 1866.

U. S. circuit court.

MRS. IRENE SMITH
vs.
CH'S G. MCHATTON, BOGART, FOLEY and AVERY, intervenors.

Points and authorities against claim of intervenors:

The Bank of Ky., thro' its agent, could transfer only its own rights.

It did transfer only those rights.—See act of subrogation.

The only right it had was to collect.—See all the testimony.

Intervenors, taking the note after dishonor, took it with all the equities:

See Whitewell, Bond & Co. *vs.* Chehore, Ex. 8 La., 542; Sawyer *vs.* Hovor, 5 Ann., 153; Lapice *vs.* Clifton, 17 La., 152. Also, 1 N. S., 605; 3 N. S., 699; 7 La., 182; 18 La., 119; 19 La., 472 and 542; 1 Rob., 39; 5 Ann., 516.

But, without regard to any equities, under art. 2,155 to 2,158 C. C., intervenors could not recover.

136 Under 2,158 as interpreting 2,156, even if Mrs. Smith herself had subrogated Bogart, Foley and Avery to all the rights of the mortgage, it could only be against her debtors, McHatton & Saunders; the latter as the one assuming the obligation.

"It cannot injure the creditor, (Mrs. Smith,) since if he (she) has been paid but in part, he (she) may exercise his (her) right for what remains due, in preference to him, (Bogart, Foley and Avery,) from whom he (she) has received only a partial payment."—(C. C. 2,158.)

(Signed) J. Q. A. FELLOWS,
Att'y for Mrs. Smith.

Additional authority for plaintiff.—Filed April 5th, 1866.

U. S. circuit court.

MRS. IRENE SMITH
vs.
CH'S G. MCHATTON.

As an additional authority in an almost parallel case, refer-

137 ence is made to R. A. Upton *vs.* Joseph Walsh; sup. C. La., decided April 11th, 1859, and not reported.

(Signed) J. Q. A. FELLOWS, *of Counsel.*

Supreme Court of Louisiana.—April 11th, 1859.

R. A. UPTON, app'ee
vs.
JOSEPH WALSH, app't. } No. 6,092.

Appeal from the 6th judicial district court of the parish of Iberville.
Mr. Justice Voorhies absent.

Mr. JUSTICE COLE:

On the 30th of January, 1854, the defendant Walsh sold to J. P. Armitage a plantation and other property for $15,000. In payment of this sum, Armitage gave his four promissory notes; one for $4,500, payable February 20th, 1854; the second for $2,833 33⅓, payable one year after its date; the third for a like amount, payable two years after date; and the fourth for $3,333 33⅓.

Armitage also assumed payment of $1,500 due by Walsh to

138 Pierre Lacave.

The first note was paid and taken up by Armitage; but the second note having matured, and not having been paid, was sold by the defendant to the plaintiff.

Upon the back of the note the following indorsement was made by the defendant Walsh: "Received payment in full of the within note from R. A. Upton, esq., to whom I hereby subrogate all my rights in and to the same, and to my rights of action against the drawer of said note without recourse on me."

(Signed) J. WALSH.
Dated New Orleans, Feb'y 2d, 1855.

The third note having fallen due on the 2d February, 1856, and remaining unpaid, Walsh sued out an order of seizure and sale, and caused the land and slaves, with the exception of Jane and her child, who had been previously sold by Armitage, to be seized and sold.

At this sale Walsh became the purchaser of the property at the price of $7,042.

Upton then instituted the present action, in which he sought to make the property and slaves acquired by Walsh, subject to
139 the mortgage then held, as averred, by the plaintiff, and to have the same sold for the payment of the mortgage note transferred by the defendant to plaintiff.

There was judgment in favor of plaintiff for $2,281 74 with legal interest, being for a proportion of the proceeds of the mortgaged property sold by the sheriff, and defendant has appealed.

The point relied upon by appellant, in his brief, is to the effect of the payment and subrogation of February 2d, 1855. He avers that by the payment the original debt was extinguished, but by the subrogation another debt was created by the mere operation of the law to which the mortgage attached to the former obligation was transferred; that the mortgage thus transferred to the new debt is secondary and inferior to that which attaches to the balance due on the original obligation, when, as in the present case, there has been only a partial payment.

Article 2,158 of the civil code is in these words: "The subrogation established by the preceding articles, takes place as
140 well against the securities as against the debtors. It cannot injure the creditors, since, if he has been paid but in part, he may exercise his right for what remains due, in preference to him from whom he has received only a partial payment."

The reason of this article is, as the creditor has his recourse for the satisfaction of his mortgage upon every part of the mortgaged property, and for every part of the debt, that the creditor cannot be placed in any worse position because some third party had thought proper to pay to the creditor a part of the mortgaged debt; and the third party cannot by assuming the place of the debtor for a part of the debt, and from being subrogated to the rights of the creditor for that part of the debt, be placed in a more favorable position than the debtor would have been if the latter had paid such part of the debt. If the debtor had paid it the mortgage would have been reduced by such amount so paid, but the creditor would still have had his
141 recourse upon the whole of the mortgaged property for the balance due. The debtor ought not then to be allowed to place the creditor in a worse position by getting some one to pay a part of what he owed. If this could be done, debtors could, by collusion, cause their creditors to be deprived of a great part of their debts; consequently, although article 2,156 of the civil code provides that conventional subrogation takes place when the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges, and mortgages against the debtor; yet article 2,158 declares that this subrogation shall not injure the

creditor, since, if he has been paid but in part, he may exercise his right for what remains due in preference to him from whom he has received only a partial payment.

Under our construction of article 2,158, appellant is entitled to be paid his claim in preference to appellee. It is, however, averred by appellee, that it would be contrary to good faith,
142 that the vendor of a claim, after receiving the price of it, should, by his own act, prevent the assignee from recovering the sum by him paid, and he relies on the case of Salzman *vs.* His Creditors.—(2 Rob., 243.)

We cannot conceive how it can be adverse to good faith that the appellant should be paid in preference to the appellee. The latter knew when he bought the note that he could claim payment of it only in accordance with the law of the land, and that one of these laws was that the creditor, if he has been paid but in part, may exercise his right for what remains due in preference to him from whom he has received only a partial payment.

It is true, that in this case, it is the creditor who has purchased the mortgaged property in satisfaction of the part of the notes held by him, but if the creditor had not bought the property at the public sale, but a third party, then there could be no doubt but that the creditor should be paid in preference to him who had been
143 subrogated to the rights of the creditor to one of the mortgage notes; why then, if the creditor has purchased, should he not also be preferred. There is no statute which forbids him to become the purchaser, and declares that in such event he shall lose the preference accorded to the creditor by article 2,158 of the civil code; neither can it injure the purchaser of one of the mortgage notes, that the creditor has bought the property instead of a third party; his rights are not diminished thereby, for in either case the creditor is paid in preference to him from whom he has received only a partial payment. It is also argued that even admitting the construction of article 2,158, as adopted by the court, to be correct, that the right of appellant to be paid, even proportionally with the plaintiff, is still not made out; for, before the party who subrogated can take advantage of the extraordinary privilege conferred upon him by this article, he must show that at the time of the transfer and subrogation he duly advised the subrogee of the existence of
144 other claims protected by the same mortgage, and that they were then in his hands, or in the hands of a party upon whom the law bestowed a preference, and that his failure to do this partakes of the characteristics of a fraud, which precludes him from enjoying the benefits that may be conferred by article 2,158.

Even conceding that plaintiff was not acquainted with the existence of other notes bearing mortgage upon the same property, and that the creditor said nothing to him upon the subject, yet this could not be considered as a fraud on the part of the creditor, in the absence of any other proof upon this point, because the exercise of the most ordinary prudence would have caused the purchaser, before buying a mortgage note, if he intended to rely upon the mortgage

for reimbursement to have examined the act of sale by which the mortgage was created.

The property at sheriff's sale not having brought a sufficient amount to satisfy the claim due the creditor Walsh, Upton
145 has therefore no privilege against the property or the proceeds of its sale.

It is, therefore, ordered, adjudged, and decreed that the judgment of the district court be avoided and reversed; that there be judgment in favor of defendant against the demand of plaintiff, and that the latter pay the costs of both courts, reserving to him any rights of action he may have against any other parties for the payment of his claim.

SUPREME COURT OF LOUISIANA,
Clerk's Office, February 20th, 1866.

I do hereby certify that the foregoing is a correct extract from the Opinion Book, No. 30, of this court.

(Signed) L. J. PISEROS, *D'y Clerk.* [SEAL.]

Judgment.

Circuit court of the United States, sixth circuit and eastern district of Louisiana, November term, 1865.

146 NEW ORLEANS, *Friday, April* 6, 1866.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

MRS. W'OW IRENE SMITH
vs.
CH'S G. MCHATTON, BOGART, FOLEY, AVERY & Co., 3d oppon'ts. } No. 3,526.

For reasons orally assigned, ordered, adjudged, and decreed that the intervention and third opposition of Bogart, Foley, Avery & Co., be dismissed so far as they claim to be paid out of the proceeds in preference to Irene Smith, and that the said intervenors recover such amount as may be left after satisfying the claim of the plaintiff, and all costs accrued herein.

Judgment rendered April 6th, 1866. Judgment signed April 17th, 1866.

(Signed) E. H. DURELL, *Judge.*

Rule for a new trial.—Extract from the minutes of 10*th April*, 1866.

147 MRS. W'OW IRENE SMITH
vs.
CHS. G. MCHATTON and BOGART, FOLEY, Avery & Co., third opponents. } No. 3,526.

On motion of Miles Taylor, of counsel for Bogart, Foley, Avery & Co., the third opponents in the above-entitled cause, for a new trial

therein, on the ground that the judgment rendered is contrary to the law and the evidence—

It is ordered that the plaintiff, the said Mrs. Irene Smith, show cause on Monday the 16th April, 1866, at 11 o'clock a. m., why a trial should not be granted.

Marshal's return on foregoing rule.

Received April 11th, 1866, and on the same day, month, and year, served a copy of the within rule and grounds on J. Q. A. Fellows, esq., the attorney for the plaintiff in the within named suit, personally, at his office, No. 13, Commercial place, in this city.

New Orleans, April 13, 1866.

(Signed) M. EGAN,
D'y U. S. Marshal.

148 *Order refusing new trial.—Extract from the minutes of* 16*th April*, 1866.

MRS. W'OW IRENE SMITH
vs.
CHAS. G. MCHATTON, and BOGART, FOLEY, Avery, & Co., 3d opponents. } No. 3,526.

The rule herein taken on the 10th inst., by Bogart, Foley, Avery & Co., third opponents, for a new trial came up.

Miles Taylor, esq., for plaintiffs in rule; J. Q. A. Fellows, esq., for defendant in rule, not present.

When, after hearing the counsel for the plaintiffs in rule, ordered that the new trial be refused with costs.

Agreement to strike out the name of W. Bogart.—Filed April 27*th*, 1866.

U. S. C. C., E. D. of La.

MRS. IRENE SMITH
vs.
CHS. G. MCHATTON, and BOGART, FOLEY, Avery & Co., third opponents. } No. 3,526.

149 The firm of Bogart, Foley, Avery & Co., being composed only of P. H. Foley, William H. Avery, and Wilhemus B. Conger, and the name of Wilhemus Bogart having been inserted in the third opposition by mistake, it is agreed that the name of the said W. Bogart be erased from the opposition, by running the pen through it, and without any motion being made.

(Signed) J. Q. A. FELLOWS, *for Pl'ff.*
" MILES TAYLOR,
Att'y for Third Opponents.

The name struck out in conformity to agreement.

(Signed) F. B. VINOT, *D'y Cl'k.*

Statement of facts.—Filed April 27th, 1866.

U. S. circuit court, E. D. of Louisiana.

MRS. IRENE SMITH
vs.
CHARLES G. MCHATTON & BOGART, FOLEY, Avery & Co., third opponents. } No. 3,526.

150 Statement of the facts proved in the cause—

1st. Mrs. Irene Smith, the plaintiff in the action, sold a plantation situated in the parish of East Baton Rouge, with a large number of slaves upon it and attached to it for its cultivation, to the defendant, McHatton, by public act passed before T. O. Stark, a notary public in the city of New Orleans, on the 30th of March, 1857, a copy of which, duly authenticated, is in evidence, for the price of $80,000, of which $10,000 was paid in cash at the time of passing the act of sale, and the remaining $70,000 was represented by five promissory notes, dated on the day of the passage of the act, four for the sum of $15,000 each, and payable, respectively, on the 1st day of May, 1858, 1859, 1860, and 1861; and one for the sum of $10,000, payable on the 1st day of May, 1862, which notes were made by McHatton, the purchaser, payable to his own order, and were by him indorsed and delivered to Mrs. Smith, the seller, after having been par-
151 aphed and marked "Ne varietur" by the notary, to identify them with the act of sale, and by the stipulations contained in the act of sale the property sold was specially mortgaged and hypothecated to secure the payment of the notes and of the interest to accrue on them.

2d. Some time after his purchase of the plantation in question, McHatton sold an undivided half of the property to a Mr. Saunders, who bound himself to McHatton to pay a portion of the notes given by him, McHatton, as a portion of the price; and the plantation was carried on afterwards in the name of McHatton & Saunders.

3d. The third opponents, Bogart, Foley, Avery & Co., were the factors for the plantation, and in the capacity of factors kept three accounts of their business transactions with the owners, viz: one with McHatton & Saunders in their firm name as partners in the plantation, and one with each of them individually.

152 4th. Before the note of McHatton for $15,000, payable on the 1st of May, 1858, arrived at maturity, it was placed by Mrs. Irene Smith in the Bank of Kentucky, at Louisville, for collection, after having been indorsed by her, and the Bank of Kentucky sent the note, with the indorsement filled up so as to make it payable to the cashier of the bank, to the Citizens' Bank, in the city of New Orleans, for collection. When this indorsement was filled up does not appear.

5th. On the last day of grace the note was duly presented for payment, and after an ineffectual demand of payment, it was protested for non-payment, at the request of the Citizens' Bank, and the Bank of Kentucky and Mrs. Smith were notified of the protest.

6th. Upwards of seven months after the protest of the note, the agent of the Bank of Kentucky, Mr. W. Logan McKnight, withdrew the note from the Citizens' Bank, where it had remained from the time of the protest, and on the 10th day of December, 1858,
153 in his capacity of agent and attorney in fact of the Bank of Kentucky, the holder of the note, by public act passed before Theodore Guyol, notary public, a copy of which is in evidence, for and in consideration of the sum of $17,068 33, the full amount of the principal and interest of the note at that date, and of the costs of protest, transferred and assigned the note in question, which is described as indorsed by Mrs. Irene Smith, and as held by the bank, to Bogart, Foley, Avery & Co., "with all the rights, actions, privileges, remedies, recourses, and mortgages to which the said Bank of Kentucky is or may be entitled, as the holder of said promissory note, but without any warranty on the part of the bank except as to the existence of the debt," etc.

7th. The third opponents had been informed that the Bank of Kentucky, the holder of the note, was pressing McHatton, the maker, for payment; and as they had means to invest, and were desirous of favoring McHatton & Saunders, who were their customers, by
154 giving them another creditor, they purchased the note, because they considered it a good investment. When they made the purchase they believed the Bank of Kentucky to be the real owner of the note, and had no knowledge whatever that it was the agent of Mrs. Smith, or that Mrs. Smith stood in any other relation to the bank than that of an indorser to it for a valuable consideration.

8th. No entry of any kind was made in the books of Bogart, Foley, Avery & Co. in the accounts of McHatton & Saunders, or of McHatton or Saunders, individually, as to this transaction.

9th. The third opponents instituted a suit against Charles G. McHatton in the district court of East Baton Rouge, in November, 1860, to recover the amount due upon the note; and this action is still pending in that court, its progress having been interrupted by the disturbed condition of the country during 1861 and sev-
155 eral succeeding years.

10th. On the 28th of February, 1865, and while the interruption of judicial proceedings in East Baton Rouge still continued, the plaintiff, Mrs. Irene Smith, instituted proceedings to enforce the payment of the two notes of $15,000 each, payable in 1860 and 1861, and of the note of $10,000, payable in 1862; and the plantation was seized and advertised for sale under the authority of the court to satisfy these three notes.

11th. On the day of the plantation was sold at public sale by the United States marshal, and Mrs. Irene Smith, the plaintiff, became the purchaser for the price of .

12th. That the note bears the number and mark of the Bank of Kentucky "271, C. G. McHatton, 15,000, 4 May," in black ink, as used by banks in marking and numbering notes when they received them for collection, and not in red ink, the kind of ink used by banks in numbering notes discounted by them.

156 13th. That it was proved on the trial by an officer of the Bank of Kentucky that it never owned the note, but that it was simply deposited with the bank by Mrs. Smith for collection.

(Signed) MILES TAYLOR,
Att'y for Third Opp'ts.
J. Q. A. FELLOWS,
Att'y for the Pl'ff.

Petition for writ of error.—Filed April 27th, 1866.

U. S. circuit court, E. D. of Louisiana.

MRS. WIDOW IRENE SMITH
vs.
CH'S G. MCHATTON and BOGART, FOLEY, Avery & Co., third opponents. } No. 3,526.

To the honorable the circuit court of the United States, sixth circuit, eastern district of Louisiana:

The petition of Wilhemus Bogart, Patrick H. Foley, William H. Avery, and Conger, composing the commercial firm of Bo-
157 gart, Foley, Avery & Co., formerly established and doing business in the city of New Orleans, and now in liquidation, and third opponents in the above-entitled case, respectfully represents:

That a final judgment was rendered therein on the day of April, 1866, against your petitioners, third opponents as aforesaid, by which they believe themselves to be aggrieved; that they are informed and believe there is error in said judgment, and that they are in law entitled to a writ of error in the said cause to operate as a supersedeas therein, on their giving bond with security conditioned according to law in such sum as the court may determine.

Wherefore your petitioners pray that a writ of error may issue in the cause, returnable at the next December term of the honorable the Supreme Court of the United States, on petitioners giving bond and good security in the sum fixed by the court according to law.

158 Petitioners further pray that the other parties to the said cause may be cited to answer the said writ of error in the said Supreme Court of the United States.

(Signed) MILES TAYLOR,
Attorney for Petitioners and Third Opponents.

Order granting writ of error.

A writ of error to operate as a supersedeas is allowed in this case as prayed for and according to law, returnable to the Supreme Court of the United States the first Monday of December next, the petitioners giving bond in the sum of ten thousand dollars with good and solvent security conditioned as the law directs.

April 27th, 1866.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed April 28th, 1866.

159 Know all men by these presents, that we, the commercial firm of Foley, Avery & Co., by Patrick H. Foley as principals, and Wilhemus Bogart as surety, are held and firmly bound unto Mrs. Widow Irene Smith, in the full and just sum of ten thousand dollars, to be paid to the said Mrs. Widow Irene Smith, her certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 28th day of April, in the year of our Lord one thousand eight hundred and sixty-six.

Whereas lately at a circuit court of the United , sixth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Mrs. Widow Irene Smith is plaintiff, C. G. McHatton is defendant, and Foley, Avery & Co., 3d opponents, judgment was rendered against Foley, Avery & Co., defendants' 3d opponents, and the said Foley, Avery & Co., having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mrs.
160 Widow Irene Smith, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such, that if the said Foley, Avery & Co. shall prosecute their writ to effect and answer such judgment and all damages and costs if they fail to make their plea good, then the obligation to be void, else to remain in full force and virtue.

(Signed) FOLEY AVERY & CO. [L. S.]
Per P. H. Foley, W. BOGART. [L. S.]

Sealed and delivered in the presence of—
(Signed) MILES TAYLOR.

25-c. int. rev. st'p affixed and cancelled.

161 United States of America, circuit court of the United States, sixth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, Charles Claiborne, clerk of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, do hereby certify that the foregoing 160 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Mrs. Widow Irene Smith *vs.* Charles G. McHatton, 3d opposition of Foley, Avery & Co., No. 3,526 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 18th day of September, A. D. 1866.

[SEAL.] CHS. CLAIBORNE, *Clerk.*

(5-ct. stamp, cancelled.)

I, Edward H. Durell, United States judge for the eastern district of Louisiana, do hereby certify that Charles Claiborne, whose name is signed to the above certificate as clerk of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand and seal, at the city of New Orleans, in said district, this 18th day of September, A. D. 1866.

E. H. DURELL, *Judge.*

(5-ct. stamp, cancelled.)

162 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States in and for the 6th circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Mrs. Widow Irene Smith, plaintiff, and Foley, Avery & Co., 3d opponents, defendants, a manifest error hath happened to the great damage of the said defendants and third opponents, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 27th of April, in the year of our Lord one thousand eight hundred and sixty-six.

CHS. CLAIBORNE,
Clerk of the United States Circuit Court for Eastern District of Louisiana.

163 THE UNITED STATES OF AMERICA,
Eastern District of Louisiana:

The President of the United States to Mrs. Widow Irene Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and eastern district of Louisiana, wherein

Foley, Avery & Co., 3d opponents, are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 30th day of April, in the year of our Lord one thousand eight hundred and sixty-six.

E. H. DURELL, *Judge.*

Marshal's return.

Received April 30th, 1866, and on the same day, month, and year served a copy of the within citation in error on Mrs. W'ow Irene Smith, the plaintiff in the above-entitled suit, by leaving the same in the hands of J. Q. A. Fellows, esq., attorney for said plaintiff, at his office, No. 13 Commercial place, in this city.

M. EGAN,
D'y U. S. Marshal.

New Orleans, May 3, 1866.

SUPREME COURT.

No.———

FOLEY, AVERY & CO., Third Opponents and Plaintiffs in Error,

versus

MRS. WIDOW IRENE SMITH.

BRIEF OF PLAINTIFFS IN ERROR.

The statement of facts in the case, pages 57, 58 and 59 of the Record, shows—

First. That the note sued on, by third opponents and plaintiffs in error, was endorsed by Mrs. Irene Smith, and placed in the Bank of Kentucky for collection, and was afterwards sent, by the Bank of Kentucky, with the endorsement filled up, so as to make it payable to the Cashier of the Citizens' Bank in the City of New Orleans.

Second. That, on the last day of grace, the note was presented for payment, and, after an ineffectual demand of payment, was protested for non-payment,

and the Bank of Kentucky and Mrs. Smith were both notified of the protest.

THIRD. That, upwards of seven months after the protest of the note, the agent of the Bank of Kentucky, Mr. W. Logan McKnight, withdrew the note from the Citizens' Bank, where it had remained from the time of the protest, and on the 10th of December, 1858, in his capacity of agent and attorney in fact of the Bank of Kentucky, the holder of the note for and in consideration of $17,068 33, the full amount of the principal and interest of the note at that date, and of the costs of protest, transferred and assigned the note, which is described in the written instrument of transfer as "endorsed by Mrs. Irene Smith, and as held by the bank," with all the rights, actions, privileges, remedies, recourses, "and mortgages" to which the Bank of Kentucky was or might be entitled "as the holder of said note," but without any warranty on the part of the bank, "except as to the existence of the debt."

FOURTH. That the third opponents and plaintiffs in error purchased the note because they considered it a good investment; and that, when they made the purchase, "they believed the Bank of Kentucky to be the real owner of the note, and had no knowledge whatever that it was the agent of Mrs. Smith, or that Mrs. Smith stood in any other relation to the bank than that of an endorser to it for a valuable consideration."

On the trial of the cause in the court below, a printed brief, in behalf of the third opponents and plaintiffs

in error, was submitted by me to the court, and, owing to some accident, that brief was copied into the record, and will be found printed in it at page 42 and following to page 51. I do not know that I can add anything to the argument there made, and I now refer the court to that brief, and to the authorities cited in it; and to the case of Murray vs. Lardner, 2 Wallace, 110, 121.

All of which is respectfully submitted,

MILES TAYLOR,

Of Counsel.

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FOURTH. That the third opponents and plaintiffs in error purchased the note because they considered it a good investment; and that, when they made the purchase, "they believed the Bank of Kentucky to be the real owner of the note, and had no knowledge whatever that it was the agent of Mrs. Smith, or that Mrs. Smith stood in any other relation to the bank than that of an endorser to it for a valuable consideration."

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Of Counsel.

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